

DEFYING SILENCE: IMMIGRANT WOMEN WORKERS, WAGE THEFT, AND ANTI-RETALIATION POLICY IN THE STATES

NICOLE TAYKHMAN*

Abstract

A recent New York Times exposé highlighted the inner workings of the nail salon industry in New York City, and revealed to the public how rampant wage theft props up an industry that relies on low-wage, undocumented women workers. New York's response provides a starting point to consider how governments should respond to wage theft as it affects undocumented women. There are various legal regimes available for responding to wage theft, but each presents serious shortcomings when it intersects with the immigration system, primarily because of the threat of retaliation. As federal protections are weak or exacerbate the victimization of undocumented women, states should strengthen anti-retaliation protections specific to undocumented workers. California passed legislation in this area which New York should adopt. While the protections provided in California's legislation would strengthen each of the various legal regimes discussed, they would also empower undocumented women to break the silence imposed by retaliation and tell narratives that resist victimization.

INTRODUCTION: WAGE THEFT IN NAIL SALONS AND ONE STATE'S RESPONSE

In May 2015, an investigative report in *The New York Times* shone a light on the inner workings of the New York metropolitan area's nail salon industry, one that many New Yorkers are aware operates to deliver what most people in the world would consider a luxury service, for a seemingly impossibly low fee.¹ The ten-dollar manicure, taken for granted in a city that promises to deliver virtually any good or service to consumers for a price, might have been justified as just another perk of living in a big city with sufficient competition in the spa services industry to keep prices low. The report not only exposed

* J.D., Columbia Law School 2016; B.A., Brown University 2011.

1 Sarah Maslin Nir, *The Price of Nice Nails*, N.Y. TIMES, May 7, 2015, <http://www.nytimes.com/2015/05/10/nyregion/at-nail-salons-in-nyc-manicurists-are-underpaid-and-unprotected.html> [https://perma.cc/C8TY-YLH7] [hereinafter Nir, *Nice Nails*].

labor practices invisible to most consumers and lawmakers, it also forced the public to confront the economic reality behind a price that low.² Perhaps most important, the report used personal stories gathered through more than one hundred interviews as the chief documentation of the labor abuses occurring in New York's nail salons,³ highlighting the human cost that undergirds the industry's profits. Through these interviews, workers, many of whom are undocumented Asian or Latina women, conveyed their experiences with wage theft.

The *Times* report identified several discrete forms of exploitation that routinely occur in New York nail salons. The first exploitative practice typically occurs on an employee's first day, when a nail salon worker might be required to pay the salon owner a "training fee"—likely between \$100 to \$200—to begin her job.⁴ She then may work unpaid, surviving on tips alone until the owner decides to pay her a wage.⁵ Once she is considered eligible for a regular wage, that wage is highly likely to fall below New York's mandated minimum wage.⁶ To earn a raise, a worker likely must learn new skills, such as eyebrow waxing or gel manicures—and pay another fee for training.⁷ The low wages are coupled with long

2 The average cost of a manicure in New York City, as calculated by the New York Times in May 2015, was about \$10.50, about half the countrywide average. *Id.*

3 *Id.*

4 *Id.* ("Tucked in [one nail salon worker at a Long Island salon, Ms. Jing Ren's] pocket was \$100 in carefully folded bills . . . : the fee the salon owner charges each new employee for her job.")

5 *Id.* (describing several salons' practice of charging a training fee, requiring a new employee to work unpaid for several weeks, and then beginning to pay the adequately trained employee \$30 or \$40 per day). More experienced workers might earn between \$50 and \$80 per day. *Id.*

6 *Id.* Some salons were documented as advertising a starting wage of \$10 a day, while lawsuits against others alleged wages as low as \$1.50 per hour. *Id.* See also Daniel Beekman, *Nail Salon Workers File Complaint Against Boss for Low Wages, Constant Spying*, N.Y. DAILY NEWS (Mar. 31, 2014), <http://www.nydailynews.com/new-york/manicurists-nail-boss-wages-abuse-article-1.1740134> [<https://perma.cc/UNV7-F4B9>] (reporting on another lawsuit in which workers alleged that a salon owner paid as little as \$5.00 for an entire day); *Lopez v. Classy Nails 125th Inc.*, (S.D.N.Y. 13-cv-01009 (JGK)). As of December 31, 2015, New York's minimum wage was \$9.00 per hour, or between \$6.80 and \$7.50 per hour, depending on the industry, if the employee makes tips. *Minimum Wages*, N.Y. ST. DEP'T LAB., <http://www.labor.ny.gov/workerprotection/laborstandards/workprot/minwage.shtm> [<https://perma.cc/Y9LS-VFT2>] (last visited Feb. 21, 2016); *Minimum Wage for Tipped Workers*, N.Y. LAB. STANDARDS (Dec. 2015), <http://www.labor.ny.gov/formsdocs/factsheets/pdfs/p717.pdf> [<https://perma.cc/37LS-PH6R>]. According to the *Times*, none of the interviewed workers reported receiving supplemental pay, which the law mandates when tips fall short of minimum wage. Nir, *Nice Nails*, *supra* note 1.

7 Nir, *Nice Nails*, *supra* note 1.

hours and few breaks.⁸ On top of this already exploitative baseline, workers report additional forms of wage abuse, including having tips docked as punishment for mistakes like spilling a bottle of nail polish.⁹

New York State responded following the exposé, though advocates for nail salon workers have been exposing the harms in the nail industry for years.¹⁰ Governor Andrew Cuomo immediately enacted temporary, emergency rules to create an Enforcement Task Force drawn from several state agencies to investigate the reported wage and health abuses.¹¹ The rules immediately required salons to post “Workers’ Bill of Rights” signs in their shops in six languages.¹² The state promised to require salons to pay back wages where necessary and to require salons to be bonded to ensure that workers would be able to collect these

8 *Id.* (noting one lawsuit’s allegation that workers “were paid just \$1.50 an hour during a 66-hour workweek” and describing other complaints of salons denying workers lunch breaks); *see also* Erika Allen, *Something Rotten in New York City Nail Salons*, N.Y. TIMES, May 7, 2015, <http://www.nytimes.com/times-insider/2015/05/07/something-rotten-in-the-state-of-nail-salons/> [<https://perma.cc/TZ22-AL9A>] (describing Sarah Maslin Nir’s inspiration for the *Times* exposé: “I went to a 24-hour spa for a pedicure. It was about 10 a.m. and I asked the woman, ‘Who works the night shift?’ She said, ‘I work the night shift.’ She said that she worked 24 hours a day, six days a week, that she slept in a barracks upstairs and that when people came in at night they shook her awake to do a treatment. On the seventh night, she said, she goes home to her apartment in Flushing, sleeps for 24 hours and comes back.”).

9 *See* Nir, *Nice Nails*, *supra* note 1. The workers also reported constant video surveillance by salon owners, and verbal and physical abuse, such as being kicked while sitting on a pedicure stool. *Id.*; *see also* Lopez, 13-cv-1009 (S.D.N.Y. 2013). A companion report documented the health effects nail salon workers experience after working extensively with harmful chemicals and fumes. Sarah Maslin Nir, *Perfect Nails, Poisoned Workers*, N.Y. TIMES, May 8, 2015, <http://www.nytimes.com/2015/05/11/nyregion/nail-salon-workers-in-nyc-face-hazardous-chemicals.html> [<https://perma.cc/KR7Z-4SBE>].

10 *See, e.g.*, NAT’L ASIAN PACIFIC AM. WOMEN’S FORUM, ISSUE BRIEF: THE NAIL SALON INDUSTRY AND THE IMPACT OF COSMETIC TOXINS ON API WOMEN’S REPRODUCTIVE HEALTH (Feb. 2008), https://napawf.org/wp-content/uploads/2009/working/pdfs/issuebrief_nailsalon_updated.pdf [<https://perma.cc/R85P-T2Y4>].

11 Joanna Walters, *Cuomo Cracks Down on Nail Salons in Move to Protect Exploited Workers*, GUARDIAN, May 11, 2015, <http://www.theguardian.com/us-news/2015/may/11/andrew-cuomo-cracks-down-nail-salons-regulation> [<https://perma.cc/VK3X-UXZE>]; *see also* *Programs: Nail Salon Safety: What You Need to Know*, N.Y. ST., <https://www.ny.gov/programs/nail-salon-safety-what-you-need-know> [<https://perma.cc/C7QY-P9DM>] (last visited July 1, 2016).

12 Michael M. Grynbaum, *New York Nail Salons Now Required to Post Workers’ Bill of Rights*, N.Y. TIMES, May 29, 2015, <http://www.nytimes.com/2015/05/30/nyregion/new-york-nail-salons-workers-bill-of-rights.html> [<https://perma.cc/3XT4-VPR5>]; *see also* *Information for Nail Salon Workers: Bill of Rights*, N.Y. ST., <https://www.ny.gov/nail-salon/information-nail-salon-workers#bill-of-rights> [<https://perma.cc/U9VK-77DG>] (last visited July 1, 2016).

wages.¹³ In June 2015, the New York Legislature passed several permanent measures addressing wage theft in the nail salon industry.¹⁴

In the following few months, New York State initiated additional efforts to protect workers from wage theft. In July 2015, Governor Cuomo formed a Task Force to End Worker Exploitation composed of twelve state agencies acting together to enforce prohibitions against wage theft.¹⁵ The Task Force subsequently opened more than 450 cases.¹⁶ New York also created an “Anti-Retaliation Unit” in October 2015, consisting of attorneys and investigators who act to inform employers of the consequences of retaliation against workers’ workplace complaints and provide employers with an opportunity to reverse retaliatory actions.¹⁷

Given the outcry following the *Times* report, journalists and advocates promptly reminded the public that wage abuse exists in other industries, such as gas stations, restaurants, and construction, among many others.¹⁸ The report also sparked debate about whether state actors could act effectively and fairly to curb wage theft in an industry like the nail

13 Walters, *supra* note 11.

14 S. 5966, 238th Legis. Ch. 80 (July 16, 2015); Sarah Maslin Nir, *New York Lawmakers Reach Deal to Impose Stricter Rules on Nail Salons*, N.Y. TIMES, June 17, 2015, <http://www.nytimes.com/2015/06/18/nyregion/new-york-lawmakers-reach-deal-to-impose-stricter-rules-on-nail-salons.html> [https://perma.cc/P4TM-EEHH]. The new legislation turned running an unlicensed salon into a misdemeanor criminal offense punishable by up to six months in jail and a fine of up to \$2,500, where it had previously been a violation punishable only by a fine. N.Y. GEN. BUS. LAW § 412 (McKinney’s 2015). The law also created a new class of worker, a “trainee,” who may work to learn the trade before obtaining a license. *See id.* at § 400 (defining “trainee”); § 408-a (setting out requirements for certificate of registration for trainees). The law also codified the bonding requirement that would help insure protection against wage fraud. *Id.* at § 410(c) (empowering the Secretary to shut down a nail salon that operates without bond or liability insurance).

15 *Governor Cuomo Announces Anti-Retaliation Unit Takes Swift and Aggressive Action to Protect Workers Fired After Wage Theft Investigation*, N.Y. ST. (Dec. 21, 2015), <https://www.governor.ny.gov/news/governor-cuomo-announces-anti-retaliation-unit-takes-swift-and-aggressive-action-protect> [https://perma.cc/A3RV-R8W6].

16 *Id.*

17 *Id.*

18 Jim Dwyer, *When It Comes to Wage Abuses, It’s Not Just the Nail Salons*, N.Y. TIMES, May 19, 2015, <http://www.nytimes.com/2015/05/20/nyregion/when-it-comes-to-wage-abuses-its-not-just-the-nail-salons.html> [https://perma.cc/A3CK-8WRX] (detailing wage claims against an owner of gas stations on Long Island, for whom at least one employee worked “seven days a week, 12 hours a day” and was owed ten weeks’ salary in back pay, and a wage theft suit against a restaurant owner in which the defendants transferred their principal asset, a home with no mortgage, to their son just before judgment was entered for the plaintiff).

salon industry, which consists of small, often immigrant-owned businesses. While some observers lauded New York for acting quickly, several launched attacks ranging from arguments that the women interviewed were not representative of a largely well-functioning industry that was unfairly portrayed,¹⁹ to reminders to the public that consumers might have a stronger responsibility to bear in changing business practices that outrage them. New York's action provides only one model for states to pursue in response to a multifaceted problem like wage theft. It is yet to be seen whether the New York approach was sufficiently responsive, imperfect, or seriously misguided, but New York's professed commitment to addressing wage theft provides a helpful starting point for considering how this particular state may move forward most effectively.

This Article is about wage theft, which is typically defined as the nonpayment of wages for work that has already been performed.²⁰ Wage theft also includes subtler forms of unfairness towards employees, such as practices that coerce employees into accepting unfair terms of employment, like payment below the legally mandated minimum wage, beginning work with periods of unpaid "training," and the requirement that an employee pay a fee to begin an entry-level job. Assessing the prevalence of wage theft in our national economy is extremely difficult, but the Economic Policy Institute recently determined that employers paid \$933 million in back wages for wage theft violations in 2012 alone.²¹ By contrast, less than \$350 million was stolen in all robberies reported to the police in the same year, such that lawmakers should be particularly attentive to the problem of wage theft today.²² \$933 million is still a severe underestimation of the problem, however, as the vast majority of

19 See Richard Bernstein, *What the 'Times' Got Wrong About Nail Salons*, N.Y. REV. BOOKS (July 25, 2015), <http://www.nybooks.com/blogs/nyrblog/2015/jul/25/nail-salons-new-york-times-got-wrong/> [https://perma.cc/45FM-PAYW]. Bernstein, "a former *New York Times* journalist who also has been, for the last twelve years, a part owner of two day-spas in Manhattan," claims both that some of Nir's assertions were unsubstantiated, such as the claim of an advertisement for a job offering \$10 per day, and that the practice at some nail salons of offering low base pay was justified since tips made up the difference. *Id.*

20 Stephen Lee, *Policing Wage Theft in the Day Labor Market*, 4 U.C. IRVINE L. REV. 655, 656 (2014). Wage exploitation more generally comes in numerous forms, including minimum wage and overtime violations, non-payment of wages, retaliation by employers against employees who complain about wage theft, misclassification of workers as independent contractors, denial of rest and/or meal breaks, and the hiding of assets to prevent employees who are successful in court from collecting judgments. NAT'L EMP'T LAW PROJECT, WINNING WAGE JUSTICE: AN ADVOCATE'S GUIDE TO STATE AND CITY POLICIES TO FIGHT WAGE THEFT 14 (2011), <http://www.nelp.org/content/uploads/2015/03/WinningWageJustice2011.pdf> [https://perma.cc/XA72-YKBM] [hereinafter NELP, WINNING WAGE JUSTICE].

21 Bryce Covert, *The Biggest Robbers in America Are Employers*, THINKPROGRESS (Sept. 12, 2014), <http://thinkprogress.org/economy/2014/09/12/3566891/wage-theft-robberies/> [https://perma.cc/6MWJ-3CN6].

22 *Id.*

low-wage and undocumented workers, who are the primary victims of wage theft, never file a claim or receive back wages for their losses.²³

This Article questions how governments should respond to wage theft as it affects undocumented women workers. Specifically, it argues that state legislators should pursue policies that protect undocumented workers from retaliation in the workplace, rather than expand access to the U Visa, a federal immigration benefit available to those who assist law enforcement in the investigation of certain crimes. In Part I, I introduce the problem of wage theft for immigrant women workers. In Part II, I consider the range of legal regimes available to advocates interested in combating wage theft, including criminal prosecutions, private civil suits, agency-led action, and market-based solutions. Analyzing the utility of each of these legal regimes, I highlight the shortcomings each tool presents as it intersects with the immigration system. In Part III, I argue that guarding against retaliation on the basis of immigration status should be a central policy focus of state laws addressing wage theft. I observe that the specter of retaliation against undocumented women workers substantially hinders the utility of the tools discussed in Part II. I consider existing federal anti-retaliation protections, and argue that these are either inherently weak or, in the case of the U Visa, exacerbate the victimization of undocumented women workers. These unsatisfying federal policies, coupled with increasing state policymaking on issues affecting immigrant workers, provide an opportunity for states to advance anti-retaliation policy that specifically protects undocumented workers.²⁴ I discuss California's recent legislation in this area, and argue that New York, as one state that has demonstrated will to address this problem, should adopt certain key provisions from California. Finally, I argue that a stronger anti-retaliation policy would empower undocumented women workers who experience wage theft to break the silence imposed on them by the threat of retaliation, tell complex narratives that resist victimization, and choose their own advocacy methods.

23 *Id.*

24 Focusing on the states attempts to fill a gap in existing literature, which has mostly focused on federal-level fixes to labor law generally, rather than state-level fixes that identify the immigration-related consequences that low-wage immigrant workers face in particular. *See, e.g.*, Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 *IND. L.J.* 1069, 1113–18 (2014) (advocating for changes to federal labor law to better protect low-wage workers). Existing literature also largely pre-dates recent federal failures to enact comprehensive immigration reform and is therefore more optimistic than this Article is about the prospect of federal efforts to address harms experienced by undocumented immigrants in general. *See, e.g.*, Leticia M. Saucedo, *Immigration Enforcement Versus Employment Law Enforcement: The Case for Integrated Protections in the Immigrant Workplace*, 38 *FORDHAM URB. L.J.* 303, 318 (2010) [hereinafter Saucedo, *Immigration Enforcement Versus Employment Law Enforcement*] (advocating for an increase to the number of U Visas that are available each year).

I. Undocumented Women Workers and Wage Theft

While employers wield wage theft against men and women, as well as citizens and non-citizens, this Article focuses on the experiences of undocumented women workers with wage theft. Women constitute about half of the 11.4 million undocumented immigrants in the United States.²⁵ While it does not appear counterintuitive that half of the country's undocumented immigrants are female, this figure is notable because the historic gap between male and female immigration to the United States, in which men have always immigrated in greater numbers, has been narrowing in recent years.²⁶ Indeed, the United States has experienced a “feminization of immigration” in recent decades, in which the number of women immigrating to the United States has surpassed the number of men.²⁷ Of course, accurately assessing the number of undocumented women in the workforce is nearly impossible because of their relative invisibility; this stems both from their fear of detection by immigration authorities and their tendency to work in the informal economy.²⁸ It is clear, nonetheless, that female undocumented immigrants constitute a substantial portion of low-wage workers. In a 2008 study of 4,387 workers in low-wage industries in the three largest American cities—Chicago, Los Angeles, and New York²⁹—55.6% of those

25 Ariel G. Ruiz, et al., *Immigrant Women in the United States*, MIGRATION POL'Y INST. (Mar. 20, 2015), <http://www.migrationpolicy.org/article/immigrant-women-united-states> [<https://perma.cc/AU8E-82N2>] (estimating that women make up forty-six percent of the undocumented immigrants in the United States between 2008 and 2012); see also Maura Toro-Morn, et al., *Introduction: Immigrant Women and Labor Disruptions*, in *IMMIGRANT WOMEN WORKERS IN THE NEOLIBERAL AGE 1* (Nilda Flores-Gonzales et al. eds., 2013) (foreign-born women make up about fifty-one percent of the immigrant workforce).

26 See Llezlie Green Coleman, *Exploited at the Intersection: A Critical Race Feminist Analysis of Undocumented Latina Workers and the Role of the Private Attorney General*, 22 VA. J. SOC. POL'Y & L. 397, 401 n.10 (2015) [hereinafter Coleman, *Exploited at the Intersection*].

27 See *id.* at 401 (quoting Kevin Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1549 (1995)).

28 See Coleman, *Exploited at the Intersection*, *supra* note 26, at 401 n.9. The Migration Policy Institute estimates that sixty-four percent of the civilian, undocumented population aged sixteen and older are employed, but this data is not broken down by gender. *Profile of the Unauthorized Population: United States*, MIGRATION POL'Y INST., <http://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US> [<https://perma.cc/25Z8-7J6F>] (last visited Jan. 26, 2016).

29 ANNETTE BERNHARDT ET AL., *BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES 2* (2009), <http://www.nelp.org/content/uploads/2015/03/BrokenLawsReport2009.pdf?nocdn=1> [<https://perma.cc/GWY5-VWEH>] [hereinafter BERNHARDT ET AL., *BROKEN LAWS, UNPROTECTED WORKERS*].

surveyed were women, and 38.8% of those surveyed were undocumented.³⁰ In the nail salon industry, women make up over 95% of all workers, though the exact proportion of these women that is undocumented is unclear.³¹ Women's concentration in particular industries requires considering how the dynamics in these industries affect them.³²

Despite their representation in the workforce, undocumented women have been disproportionately less visible than their male counterparts in scholarly literature examining the effects of labor and employment law regimes on undocumented workers.³³ As Lizabeth Green Coleman asserts, when scholars discuss undocumented women workers, it is through monolithic "stock stor[ies]," typically portraying them as domestic workers, ignoring the thousands of immigrant women who work outside the home in various industries.³⁴ Women's experiences with wage theft suffer particular invisibility. Several scholars have appropriately focused on forms of workplace abuse that are more commonly viewed as explicitly gendered, such as sexual harassment and assault.³⁵ The case of nail salon workers is an example of wage theft in which workers are largely immigrant women, providing a useful backdrop for the consideration of possible policy solutions.

The reality is that female undocumented workers are especially vulnerable to wage theft. Immigrants are more likely to experience wage theft than non-immigrants, and wom-

30 *Id.* at 15.

31 NAT'L ASIAN PACIFIC AM. WOMEN'S FORUM, *supra* note 10, at 1. Asian women represent over forty percent of all nail technicians nationwide. *Id.*

32 For example, the use of toxic chemicals in the nail salon industry, where virtually all workers are women of reproductive age, causing cancer, miscarriages, and infertility, represents another important gendered form of workplace exploitation, but is outside the scope of this paper. *See id.*

33 Coleman, *Exploited at the Intersection*, *supra* note 26, at 405 (citing Elizabeth J. Kennedy, *The Invisible Corner: Expanding Workplace Rights for Female Day Laborers*, 31 BERKELEY J. EMP. & LAB. L. 126 (2010)); *see also* Maura Toro-Morn, et al., *supra* note 25, at 7 ("Although we know much about men's involvement in the informal economy, women's involvement and its impact on gendered work is missing from scholarly accounts and remains poorly understood.").

34 Coleman, *Exploited at the Intersection*, *supra* note 26, at 401. There are even fewer accounts of undocumented women who work in the service industry, as many scholars rightly focus on the many female undocumented workers in agriculture. *See, e.g.*, S. POVERTY LAW CTR., INJUSTICE ON OUR PLATES: IMMIGRANT WOMEN IN THE U.S. FOOD INDUSTRY (2010), https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/Injustice_on_Our_Plates.pdf [<https://perma.cc/E658-2UJB>].

35 *See, e.g.*, Note, Gabriela Parra, *Immigration Policy for Workplace Violence and Undocumented Women: State-Based Solutions for Wisconsin*, 30 WIS. J.L. GENDER & SOC'Y 99 (2015) (focusing on sexual harassment and abuse in the workplace).

en are more likely to experience wage theft than men.³⁶ Among foreign-born workers, undocumented women are the group most likely to experience wage theft.³⁷ Nearly half of female undocumented workers surveyed in Chicago, Los Angeles, and New York had experienced minimum wage violations in the week prior to the survey, compared to thirty percent of surveyed men.³⁸

Moreover, women experience the harms of wage theft in gendered ways, as sexism in the workplace—whether in the form of sexual harassment, insensitivity to childcare needs, or reinforcement of cultural, patriarchal gender tropes—further skews the power imbalance inherent where an employee is both undocumented and works for a low wage.³⁹ Because of this exacerbated power imbalance, I choose to focus on the experiences of undocumented working women, despite the applicability of my analyses to the experiences of undocumented male workers. I do so for a number of reasons: first, the intersections of their identities as women, low-wage workers, and undocumented immigrants exacerbate power differentials that encourage employers to engage in wage theft; second, female undocumented immigrant workers are often concentrated in particular industries apart from men, where dynamics specific to those industries should play a role in determining appropriate policy solutions; and third, because scholars tend to present the experiences of men as the default against which policy solutions should be measured, a trend which feminist scholarship resists.

II. Available Legal Regimes to Combat Wage Theft

This Section explores the range of legal regimes that are currently available to advocates seeking to combat wage theft. I evaluate the benefits and limits to using each regime as the core of a framework designed to combat wage theft, paying special attention to its intersection with the immigration system. The legal tools fall largely into three categories: top-down government enforcement, including criminal prosecutions and agency action at the federal, state, and local levels; private enforcement through civil actions by employees; and workplace monitoring by unions, community-based worker centers, and consumers.⁴⁰

36 Coleman, *Exploited at the Intersection*, *supra* note 26, at 403 (citing BERNHARDT ET AL., *BROKEN LAWS, UNPROTECTED WORKERS*, *supra* note 29, at 5).

37 *Id.*

38 *Id.* at 404.

39 *See infra*, Part III.D.

40 NELP, *WINNING WAGE JUSTICE*, *supra* note 20, at 12; *see also* Charlotte S. Alexander, *Anticipatory*

Undoubtedly, an effective response to wage theft will include elements of each of these tools.

A. Criminal Prosecutions

A criminal-law-centered framework recognizes wage theft to be a crime and responds with appropriate state penalties. These penalties move beyond forcing an employer to pay damages to the aggrieved worker or a fine to an agency or court, sending a stronger societal message of disapproval of wage theft.⁴¹ The federal Fair Labor Standards Act (“FLSA”), which regulates minimum wage and overtime compensation, already provides for enforcement through criminal prosecution.⁴² To better address wage theft using the criminal law, advocates propose amending state criminal codes to include the crime of “theft of services,”⁴³ as almost all states define “services” to include labor.⁴⁴ States may also add criminal penalties for violations of state wage and hour laws, increasing the penalties for employers’ failure to pay wages on time.⁴⁵ Possible penalties include fines paid into a public fund, restitution to victims, and jail sentences for egregious violations.⁴⁶

Advocates for a criminal law approach argue that this response fully marshals the state’s muscle, sending a strong message that raises awareness of wage theft’s criminality in both affected industries and the general public.⁴⁷ While existing worker-driven responses like civil suits and agency actions that rely on worker complaints are confusing, time-consuming, and costly for a worker to pursue, the criminal law provides a set of resources that the state, rather than the worker, is responsible to trigger.⁴⁸

Retaliation Threats and the Silencing of the Brown Collar Workforce, 50 AM. BUS. L.J. 779, 831–34 (2013).

41 NELP, WINNING WAGE JUSTICE, *supra* note 20, at 34.

42 See 29 U.S.C. § 216(a) (providing for criminal penalties, including a fine of not more than \$10,000 or imprisonment of up to six months for willful violations of the provisions of § 215, including those requiring payment of minimum wage and overtime compensation, and the anti-retaliation provision).

43 NELP, WINNING WAGE JUSTICE, *supra* note 20, at 34.

44 Lee, *supra* note 20, at 663 n.54 (citing Rita J. Verga, *An Advocate’s Toolkit: Using Criminal “Theft of Service” Laws to Enforce Workers’ Right to be Paid*, 8 N.Y. CITY. L. REV. 283, 284 n.5 (2005)).

45 NELP, WINNING WAGE JUSTICE, *supra* note 20, at 34.

46 *Id.*

47 *Id.*

48 Lee, *supra* note 20, at 657.

The use of the criminal law also fits into a larger push for local regulation of the workplace. Advocates proposing greater local regulation argue that the National Labor Relations Act (“NLRA”), which preempts most state labor laws, has been unsuccessful in supporting meaningful worker organizing in the workplace.⁴⁹ Meanwhile, almost every state already deals with non-payment of wages through its state labor laws, which provide overlapping administrative, civil, and criminal penalties for wage theft.⁵⁰

However, the effectiveness of the criminal law depends on cooperation by law enforcement, including prosecutors’ willingness to pursue a set of crimes and police departments’ scrupulous use of discretion in policing for wage theft. Prosecutorial discretion presents a significant hurdle given that wage violations typically occur in the form of small but chronic violations. To effectively uncover violations, law enforcement will first need to eschew the belief that wage violations are a civil matter, to be resolved by worker-driven civil actions.⁵¹ In order to encourage prosecutions, advocates might have to change their messaging techniques: because criminal law is a tool for the state’s use rather than for the workers themselves, prosecutors may be more likely to respond to the harm wage theft causes for state finances through loss of tax revenue, rather than worker livelihood or dignity.⁵²

A larger problem specific to immigrant-dominated industries looms in the greater use of the criminal law, tempering most advocates’ proposals. Effective use of the criminal law requires complete trust between immigrant communities and law enforcement. Specifically, in order for immigrant workers to seek help from the police, they need to be sure that law enforcement will not prosecute workers themselves for violations of immigration or tax laws. To this end, law enforcement officers must internalize that immigration status is irrelevant to a criminal wage theft claim.⁵³ However, federal immigration enforcement and detention programs that deputize local law enforcement agencies by using arrest records

49 *Id.* at 663–64 (citing Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1172–74 (2011) (discussing state and local governments’ creative attempts to work around the static NLRA, which preempts most local labor reforms, with states nonetheless providing organizing rules that deviate from the federal scheme)).

50 Verga, *supra* note 44, at 287–88.

51 NELP, WINNING WAGE JUSTICE, *supra* note 20, at 35.

52 *Id.* For example, New York State law enforcement could be motivated by the fact that full compliance with wage and hour laws would bring the state \$427 million a year in revenue through reduced employment tax avoidance. *Id.*

53 *Id.* In New York, egregious nonpayment of wages may be punished by criminal penalties in the form of fines and imprisonment of up to a year. N.Y. LAB. LAW § 198-a (McKinney’s 2015).

for immigration purposes, like the Priority Enforcement Program (“PEP”), currently render the irrelevance of immigration status to the criminal law a legal fiction.⁵⁴ This entanglement between federal immigration authorities and local law enforcement leads to the fundamental problem that local law enforcement is subject to competing pressures when an undocumented immigrant seeks out help: to protect that individual from criminal wage theft by enforcing wage laws, and to identify and detain that individual to enforce immigration law and carry out the federal government’s stated deportation priorities.⁵⁵

Advocates for a criminal law approach to wage theft must contend with the reality that increased policing in immigrant-dominated industries will lead to a higher risk of deportation.⁵⁶ PEP’s immediate integration of local law enforcement with immigration enforcement at the initial arrest stage has transformed a police officer’s decision to arrest, rather than an immigration officer’s decision to initiate removal proceedings, “the discretion that matters” most to an undocumented individual.⁵⁷ As a result, where an employer suspects

54 Between 2008 and 2014, the federal government used the Secure Communities program to automatically cross-check fingerprints obtained by local police upon an arrest with a Department of Homeland Security (“DHS”) database containing the individual’s immigration-related information. NAT’L IMMIGRATION LAW CTR., PRIORITY ENFORCEMENT PROGRAM: WHY ‘PEP’ DOESN’T FIX S-COMM’S FAILINGS 1 (2015), <https://www.nilc.org/wp-content/uploads/2015/11/PEP-does-not-fix-SComm-2015-06.pdf> [<https://perma.cc/K2QG-HB46>]. The Obama administration discontinued Secure Communities in November 2014, replacing it with PEP, and acknowledging that the program needed to be “implemented in a way that supports community policing and sustains the trust of all elements of the community in working with local law enforcement.” Dep’t of Homeland Security Memorandum, Secure Communities (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf [<https://perma.cc/AA2P-KCLB>]. However, the administration replaced Secure Communities with the Priority Enforcement Program (“PEP”), which kept in place the policy of cross-checking fingerprints obtained by local police with federal DHS databases. NAT’L IMMIGRATION LAW CTR., *supra* at 1. Under PEP, Immigration and Customs Enforcement (“ICE”) may still request to have an arrested individual transferred into its custody if that person is determined to be an immigration enforcement priority under the November 20, 2014 memorandum. *Id.* at 2.

55 Lee, *supra* note 20, at 657–58. Besides the legal scheme that entangles immigration and local authorities, communities are incentivized to collaborate with federal immigration enforcement through various arrangements. For example, many rely on revenue through government contracts for the construction and maintenance of immigration detention centers in their communities. See, e.g., Chris Kirkham, *Private Prisons Profit from Immigration Crackdown, Federal and Local Law Enforcement Partnerships*, HUFFINGTON POST (June 7, 2012), http://www.huffingtonpost.com/2012/06/07/private-prisons-immigration-federal-law-enforcement_n_1569219.html [<https://perma.cc/99U3-6WRZ>] (“Rural towns and counties have eagerly embraced the arrival of immigrant prisoners for the attendant economic benefits, including tax revenues and jobs.”).

56 Lee, *supra* note 20, at 668.

57 *Id.* (quoting Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State*

that an employee might contact the authorities to complain of wage theft, this integration “effectively sets up a race between a bad actor employer and an unauthorized immigrant worker to see who can contact the police first.”⁵⁸ Thus, the criminal law may only be wise to use in localities where the police have insulated themselves from immigration authorities.⁵⁹

Overall, the use of the criminal law might be too heavy-handed an approach, as it attempts to solve the problem of wage theft while exacerbating the break-up of immigrant communities through deportation.⁶⁰ This is especially true in industries where business-owners themselves might be undocumented as well, and therefore could be subject to the same immigration consequences that the employees fear.⁶¹ Finally, the criminal law may be the wrong conceptual framing of the problem, by inevitably focusing on individual “bad actors” rather than the structural economic factors that most contribute to wage exploitation in immigrant-dominated industries.⁶² These serious downsides may not necessitate abandoning all use of the criminal law, given its potential use as the state’s strongest sanction in the most egregious wage theft cases, but advocates should closely consider the effect of policing on immigrant communities before resorting to the criminal law.

and *Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1836 (2011)).

58 *Id.* at 669.

59 There are currently three hundred and twenty-six counties, thirty-two cities, and four states that limit local law enforcement’s involvement in federal immigration enforcement. “*Sanctuary Cities, Trust Acts, and Community Policing Explained*,” AM. IMMIGR. COUNCIL (Oct. 10, 2015), <http://www.immigrationpolicy.org/just-facts/sanctuary-cities-trust-acts-and-community-policing-explained> [https://perma.cc/6WWG-9NWB] (last visited Jan. 4, 2016). All but six of these jurisdictions enacted policies adopting community policing or trust laws after 2011, in response to Secure Communities. *Id.*

60 Lee, *supra* note 20, at 674.

61 *See id.* at 674–75 (discussing immigrant-owned businesses as representing important community institutions and the effect that the employer’s deportation may have on the community); *see also* Note, Michael Mastman, *Undocumented Entrepreneurs: Are Business Owners “Employees” Under the Immigration Laws*, 12 N.Y.U. J. LEGIS. & PUB. POL’Y 225, 225–26 (2008) (explaining that while exact numbers are difficult to obtain, undocumented immigrants make up a substantial proportion of American business owners).

62 Lee, *supra* note 20, at 677; *see also* KIM BOBO, *WAGE THEFT IN AMERICA* 46–54 (2009) (identifying societal, economic, and political forces that contribute to wage theft, including business practices like expanding at all costs or understaffing).

B. Private Civil Lawsuits

Unlike the criminal law, private, civil suits have historically represented a significant method of fighting wage theft. Plaintiffs wishing to bring a civil wage claim have two major options: a federal claim under the Federal Labor Standards Act,⁶³ and claims under state wage and hour laws.⁶⁴ FLSA sets the federal minimum hourly wage⁶⁵ and mandates overtime pay at a rate of time-and-a-half for non-exempt workers who work more than forty hours in a week.⁶⁶ FLSA provides for a private right of action for employees seeking to recover unpaid minimum wages or overtime compensation.⁶⁷ FLSA also prohibits retaliation by employers against employees who file FLSA claims or testify in proceedings.⁶⁸

Styled like other civil rights statutes, FLSA is an attractive avenue for recourse for aggrieved workers. The statute does not require exhaustion of administrative remedies, allowing plaintiffs to file an action in federal or state court once an employer fails to pay full compensation.⁶⁹ It also contains the punitive measure of providing for liquidated damages for willful violations.⁷⁰ Plaintiffs can bring their FLSA claims individually or by joining claims in a collective action.⁷¹ To pursue a collective action, plaintiffs need not establish the more stringent federal requirements of a class action, but must simply return a consent

63 29 U.S.C. § 216.

64 At least one proposal calls for the use of tort law by immigrant workers experiencing workplace abuse, particularly the tort of intentional infliction of emotional distress. Note, Meredith B. Stewart, *Outrage in the Workplace: Using the Tort of Intentional Infliction of Emotional Distress to Combat Employer Abuse of Immigrant Workers*, 41 U. MEM. L. REV. 187 (2010).

65 29 U.S.C. § 206.

66 *Id.* at § 207(a).

67 *Id.* at § 216(b). FLSA also provides for other mechanisms of enforcement, including agency suits and criminal prosecutions.

68 *Id.* at § 215(a)(3).

69 *See, e.g.*, *Grochowski v. Ajet Const. Corp.*, No. 97-CV-6269, 2000 WL 1159640, at *3 (S.D.N.Y. Aug. 16, 2000) (“The FLSA does not require exhaustion of administrative remedies,” such that a district court has discretion to determine whether a plaintiff should have exhausted administrative remedies.) (citing 29 U.S.C. § 201).

70 *See* 29 U.S.C. § 216(b).

71 *Id.* at § 216(b) (“An action to recover the liability prescribed . . . may be maintained against any employer . . . by any one or more employees for and [on] behalf of himself or themselves and other employees similarly situated.”).

form to join the case as an “opt ins,” and demonstrate that they are “similarly situated” to the named plaintiff.⁷² Plaintiffs have increasingly turned to collective actions in recent years, since any one plaintiff’s damages may be too small to be worth pursuing individually.⁷³ In contrast to individual cases, collective FLSA actions have the power to raise awareness of wage abuse both within particular industries and the general public. For example, in 2012, the Mexican American Legal Defense and Education Fund (“MALDEF”) brought suit against a carwash, beginning with four plaintiffs but anticipating joinder by more than one hundred past employees, bringing damages into seven figures.⁷⁴

One of FLSA’s most important contributions to wage theft cases is its fee-shifting provision, following the “private attorney general” model of enforcement of other civil rights statutes.⁷⁵ The plaintiff and her attorney sue to vindicate both the plaintiff’s own injury and congressional policy, acting as a “Supplemental Law Enforcer” to the government’s own enforcement of wage and hour laws.⁷⁶ In the wage and hour context, this supplementary role is crucial, since the Department of Labor’s (“DOL”) Wage and Hour Division (“WHD”) receives far more FLSA complaints than it can investigate.⁷⁷ The fee-shifting in FLSA also encourages individual workers to pursue recourse in the absence of union action, a key fact given that immigrants often work in non-unionized industries.⁷⁸ Furthermore, attorneys’ fee awards are key to encouraging plaintiffs’ attorneys to pursue claims that otherwise might result in only a small amount of damages, and consequently, a small contingency

72 *Id.*; see also Nantiya Ruan, *Facilitating Wage Theft: How Courts Use Procedural Rules to Undermine Substantive Rights of Low-Wage Workers*, 63 VAND. L. REV. 727, 744–45 (2010) (explaining the mechanics of a collective action brought under § 216(b) of FLSA).

73 Coleman, *Exploited at the Intersection*, *supra* note 26, at 419.

74 Lee, *supra* note 20, at 662 n.44 (citing Sam Quinones, *Carwash Owners Sued by Workers*, L.A. TIMES, May 22, 2012, at AA3).

75 29 U.S.C. § 216(b) (allowing for reasonable attorneys’ fees to be paid to prevailing plaintiffs). See Coleman, *Exploited at the Intersection*, *supra* note 26, at 416–20 for a discussion of the importance of the private attorney general in the wage and hour context.

76 Coleman, *Exploited at the Intersection*, *supra* note 26, at 417–19 (quoting William B. Rubenstein, *On What a “Private Attorney General” Is—And Why It Matters*, 57 VAND. L. REV. 2129, 2146 (2004)).

77 *Id.* at 418.

78 *Id.* at 423. Even if immigrants were represented by unions, the Supreme Court has held that undocumented immigrants are barred from obtaining certain remedies under the NLRA, which unions more commonly pursue. *Id.* at 423; *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137 (2002) (undocumented immigrants are foreclosed from receiving National Labor Relations Board (“NLRB”) award of backpay).

fee.⁷⁹ Low-wage workers suffering wage theft certainly will be least able to pay attorneys at market rates.⁸⁰ They will also be least able to pursue claims *pro se*, because of the time and expense inherent in navigating the litigation process without an attorney.⁸¹ Finally, fee-shifting provisions empower individual plaintiffs to tell their stories.⁸² The ability to tell a story through litigation provides catharsis to the aggrieved worker, encourages an audience (whether judge, jury, or public) to be receptive to the claim, promotes solidarity among workers who realize they are not alone, and provides an opportunity for plaintiffs to tell narratives that complicate stereotypes the public often relies on to construct an image of an exploited, low-wage immigrant worker.⁸³

However, since FLSA exempts many small businesses, state law claims may be many workers' only avenue for redress.⁸⁴ State causes of action are perhaps even more attractive, as some states provide workers with greater protection than the federal law: some states and municipalities allow for treble damages for wage claims;⁸⁵ some have extended statutes of limitations for wage claims of up to four to six years—in contrast to the typical

79 See NELP, WINNING WAGE JUSTICE, *supra* note 20, at 31. *But see* Lee, *supra* note 20, at 662 (even with attorneys' fee provisions, private attorneys using contingency fee models may not have strong incentives to pursue suits for employees to regain relatively low wages).

80 Coleman, *Exploited at the Intersection*, *supra* note 26, at 417–18.

81 *Id.*

82 *Id.* at 426.

83 *See id.* at 428–29.

84 See Note, Lauren K. Dasse, *Wage Theft in New York: The Wage Theft Prevention Act as a Counter to an Endemic Problem*, 16 CUNY L. REV. 97, 106–07 (2012); 29 U.S.C. § 203(s)(1)(A)(ii) (defining an “[c]enterprise engaged in commerce or in the production of goods for commerce,” to which FLSA applies, as an “enterprise whose annual gross volume of sales made or business done is not less than \$500,000”).

85 NELP, WINNING WAGE JUSTICE, *supra* note 20, at 19–20. As of 2011, five states imposed treble damages for minimum wage claims, while ten states allowed for treble damages in other wage claims, with some limitations. *Id.* New York provides for treble damages (in the form of an award of double the total amount of wages plus liquidated damages in the amount of one hundred percent of the wages) for wage claims against repeat offenders and employers whose violations are found to be “willful or egregious.” N.Y. LAB. LAW § 218 (McKinney’s 2015).

two-to-three year statute of limitations for wage claims;⁸⁶ and many require attorneys' fee awards in wage payment lawsuits.⁸⁷

The hurdles that an undocumented plaintiff faces in pursuing a civil lawsuit for wage theft cautions against relying on civil suits as a primary mechanism of enforcement, at least without additional reforms in place. As a suit by private attorneys is largely plaintiff-driven, relying on the private attorney general model of enforcement requires low-wage workers to have adequate information about their workplace rights, which they likely do not.⁸⁸ Language barriers and cost, regardless of fee-shifting, are formidable hurdles for most low-wage workers in obtaining legal counsel.⁸⁹

Once workers file suit, there is a good chance they may be subject to some form of retaliation—which many state laws fail to adequately protect against.⁹⁰ Advocates have documented numerous cases in which employers who routinely hire undocumented immigrants conveniently decide to conduct a “self-audit” or “re-verify” workers' immigration status only after workers filed workplace-based complaints.⁹¹ In one recent case, undocumented workers who filed claims against their employer found themselves criminally prosecuted, detained, and facing prison sentences for crimes related to working without

86 NELP, WINNING WAGE JUSTICE, *supra* note 20, at 21–24. New York has a six-year statute of limitations for unpaid wage claims. N.Y. LAB. LAW § 198(3).

87 NELP, WINNING WAGE JUSTICE, *supra* note 20, at 32.

88 See Elizabeth Kristen, Blanca Banuelos & Daniela Urban, *Workplace Violence and Harassment of Low-Wage Workers*, 36 BERKELEY J. EMP. & LAB. L. 169, 180 (2015) (“A survey conducted by the Brennan Center for Justice found that only 18% of low-wage workers surveyed could even identify the minimum wage let alone other important workplace rights.”).

89 See NELP, WINNING WAGE JUSTICE, *supra* note 20, at 31 (“In Washington state, a civil legal needs assessment performed under the direction of the state Bar Association found that only half of low-income people with employment problems were able to get advice or representation from an attorney.”); see also Kristen et al., *supra* note 88, at 180–83 (discussing financial barriers imposed by litigation, which require not only finding an affordable attorney but taking time off of work to pursue litigation). Geographic barriers are also substantial for many undocumented workers across the country, but are less of a problem for workers in cities.

90 NELP, WINNING WAGE JUSTICE, *supra* note 20, at 12.

91 REBECCA SMITH & EUNICE HYUNHYE CHO, NAT'L EMP'T LAW PROJECT, WORKERS' RIGHTS ON ICE: HOW IMMIGRATION REFORM CAN STOP RETALIATION AND ADVANCE LABOR RIGHTS 10–12 (2013) [hereinafter NELP, WORKERS' RIGHTS ON ICE].

authorization, including the false use of a social security number.⁹²

If they are able to pursue claims without retaliation, undocumented workers still face procedural hurdles—some common to all plaintiffs and some specific to their undocumented status—that make the chance of success relatively low.⁹³ At the outset, employers use the procedural tactic of early offers of judgment to “pick off” named plaintiffs in wage theft class actions, causing dismissal of the entire action.⁹⁴ Defense lawyers often attempt to derail the case to focus on the plaintiff’s immigration status rather than the merits of her claim.⁹⁵ Plus, federal law limits the remedies available to an undocumented worker. Under the Supreme Court’s 2002 decision in *Hoffman Plastics Compound v. NLRB*, undocumented immigrant workers are not entitled to backpay or reinstatement in actions under the NLRA.⁹⁶ The Court held that the availability of these remedies would undermine federal immigration law by rewarding the undocumented workers “for wages that could not lawfully have been earned, and for a job obtained in the first instance by criminal fraud.”⁹⁷ This ruling has met substantial criticism: several lower courts have declined to follow the reasoning of *Hoffman Plastics* on state law grounds.⁹⁸ But the impact of *Hoffman Plastics*

92 *United States v. Moreno-Lopez*, No. 4:09-CR-21 (2010 U.S. Dist. LEXIS 2597) (E.D. Tenn. Jan. 13, 2010) (discussed in Saucedo, *Immigration Enforcement Versus Employment Law Enforcement*, *supra* note 24).

93 In general, the private attorney general model’s success depends on “judicial embrace of rules governing pleading, summary judgment, standing, and fee recovery.” Coleman, *Exploited at the Intersection*, *supra* note 26, at 420 (quoting Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339, 1354 (2012)).

94 *See* Ruan, *supra* note 72, at 729.

95 *See, e.g.*, Barahona v. Trs. of Columbia Univ. in the City of N.Y., 816 N.Y.S.2d 851 (Kings Cty. Mar. 10, 2006) (defendants were entitled to discovery regarding plaintiff worker’s immigration status); Daniel Ford, et al., *Protecting the Employment Rights and Remedies of Washington’s Immigrant Workers*, 48 Gonz. L. Rev. 539, 542–46, 553–57 (2012–2013). *But see* Michael H. LeRoy, *Remedies for Unlawful Alien Workers: One Law for the Native and for the Stranger Who Resides in Your Midst? An Empirical Perspective*, 28 GEO. IMMIGR. L.J. 623, 651 (2014) [hereinafter LeRoy, *Remedies*] (explaining that while immigration status may be discoverable, empirically speaking, most courts disregard it).

96 *Hoffman Plastics Compound v. NLRB*, 535 U.S. 137, 149 (2002); *see also* Note, Roxana Mondragón, *Injured Undocumented Workers and Their Workplace Rights: Advocating for a Retaliation Per Se Rule*, 44 COLUM. J.L. & SOC. PROBS. 447, 452–54 (2010–2011) (providing an overview of *Hoffman Plastics*).

97 *Hoffman Plastics*, 535 U.S. at 149.

98 *See, e.g.*, *Madeira v. Affordable Hous. Found., Inc.*, 315 F. Supp. 2d 504, 507 (S.D.N.Y. 2004) (“[p]laintiff’s alien status does not prevent him from recovering compensatory damages for defendants’ violation of New York Labor Law,” citing the New York Attorney General’s Official Opinion following *Hoffman Plastics*); *Correa v. Waymouth Farms, Inc.*, 664 N.W.2d 324, 331 (Minn. 2003) (undocumented

should not be understated. Advocates have observed that *Hoffman Plastics* “devastated workers’ organizing efforts” by leaving undocumented workers without a meaningful remedy for an employer’s retaliation in response to worker organizing.⁹⁹ The effect is often that workers are too afraid to complain, leaving egregious workplace violations unchallenged.¹⁰⁰

In wage theft cases, a plaintiff may encounter the biggest hurdle after actually winning her claim—that is, collecting on the judgment. Employers that are frequently subject to wage theft claims, including restaurants, construction companies, and nail salons, have developed tactics to successfully avoid paying judgments even after losing the case. Out of a survey of seventeen legal services organizations and employment attorneys representing low-wage workers, one advocacy group identified sixty-two recent New York federal and state court wage theft judgments that employers had not paid as of 2015, including forty-three default judgments, amounting to over \$25 million owed to 284 workers.¹⁰¹ Upon being served with a complaint, the owners of Babi Nail Salon on Long Island declared bankruptcy, sold the largest of their three salons only to reopen it in their son’s name, and put their million-dollar home up for sale. The court denied the plaintiffs’ motion for attachment of the employers’ assets, finding that the plaintiffs did not demonstrate fraudulent intent, the high burden necessary to prevent transfer of assets in New York.¹⁰² Workers in New York have similarly found themselves unable to use lien law to obtain unpaid wages, while other states allow workers to record a lien for unpaid wages against an employer’s

immigrants are entitled to receive temporary total disability benefits under state policy); *Salas v. Sierra Chem. Co.*, 327 P.3d 797, 807 (Cal. 2014) (state law allows remedy of lost wages to undocumented worker for period prior to employer’s discovery of immigration status). In part because of the extent to which lower courts have expressed disagreement with *Hoffman Plastics*, some scholars predict that it is on shaky ground as precedent. See Michael H. LeRoy, *Overruling Precedent: “A Derelict in the Stream of the Law,”* 66 SMU L. REV. 711 (2013) (providing an empirical argument that *Hoffman Plastics* may be overruled soon).

99 Leticia M. Saucedo, *A New “U”: Organizing Victims and Protecting Immigrant Workers*, 42 U. RICH. L. REV. 891, 895 (2008) [hereinafter Saucedo, *A New “U”*].

100 *Id.*

101 CMTY DEV. PROJECT AT THE URBAN JUSTICE CTR. ET AL., *EMPTY JUDGMENTS: THE WAGE COLLECTION CRISIS IN NEW YORK* 4 (2015) [hereinafter *EMPTY JUDGMENTS*].

102 *Id.* at 20 (citing *Song v. 47 Old Country, Inc.*, No. 09 Civ. 5566 (E.D.N.Y. filed Dec. 21, 2009)). In response to this case and similar cases, advocates argue for a lowering of the standard for attachment of defendants’ property that would allow workers who show a likelihood of success on their wage theft claims to attach such property during the pendency of the action—the standard used in Connecticut. *Id.* at 18.

property.¹⁰³ A third problem exists for workers who attempt to collect from the top shareholders from a closely held corporation or the top members of an LLC.¹⁰⁴ Even where these shareholders are legally personally liable for unpaid wages, several procedural hurdles make them rarely required to pay in practice, a fact that makes attorneys less willing to pursue workers' claims in the first place.¹⁰⁵

Relying on civil lawsuits presents a larger, conceptual problem as well. The legal process has the tendency to diminish the complexities of human experiences by requiring plaintiffs' stories to fit into legal boxes. This is apparent in the requirement that joined plaintiffs in FLSA collective actions be "similarly situated" and therefore portrayed as having parallel experiences to the exclusion of any unique details.¹⁰⁶ It is illustrated when a jury decides that hearing a non-English speaking worker's experience through an interpreter rendered the story too "strange" to be persuasive.¹⁰⁷ After *Hoffman Plastics*, immigrant workers' access to the courts in wage theft cases has largely depended on putting forth palatable narratives of "the culpable employer" who knowingly exploited "the innocent victim."¹⁰⁸ Advocates should consider whether civil suits are, on balance, useful in conveying genuine experiences of wage theft, given the legal process' tendency to require stock stories to be successful.

C. Agency-led Action

Given the forces that dissuade or prevent individual undocumented workers from pursuing their own legal remedies for wage theft, advocates often prod agencies to focus more of their resources on wage law enforcement in industries reliant on immigrant labor.¹⁰⁹

103 EMPTY JUDGMENTS, *supra* note 101, at 8–9, 16–17 (comparing New York's failure to provide for wage liens to Maryland and Wisconsin's provisions for wage liens, limiting the ability of the employer to transfer property while the wage claim is pending).

104 *Id.* at 24.

105 *Id.*

106 Coleman, *Exploited at the Intersection*, *supra* note 26, at 432.

107 Kristen et al., *supra* note 88, at 182.

108 Jennifer J. Lee, *Outsiders Looking In: Advancing the Immigrant Worker Movement Through Strategic Mainstreaming*, 2014 UTAH L. REV. 1063, 1073.

109 See, e.g., Leticia M. Saucedo & Maria Cristina Morales, *Voices Without Law: The Border Crossing Stories and Workplace Attitudes of Immigrants*, 21 CORNELL J.L. & PUB. POL'Y 641, 657 (2012) (Since the typical narratives surrounding border crossing and immigrant experiences in the workplace have the effect of

The federal Department of Labor and its Wage and Hour Division, as well as its state- and city-level counterparts, are chiefly responsible for enforcing wage and hour laws.¹¹⁰ These agencies have greater expertise than the police or individual workers in identifying tactics used to avoid paying workers legal wages. Agencies also have the benefit of limited jurisdiction: they can focus on the wage and hour violations they learn about without weighing these problems against separate policy concerns regarding immigration—an issue legislators putting forth policy proposals will likely try to balance against labor concerns.¹¹¹ Moreover, agencies have been able to use their independence and expertise to provide protection to undocumented workers despite law that is unfriendly to these workers. The Equal Employment Opportunity Commission (“EEOC”) and DOL provided an example of “immigrant-inclusive implementation of otherwise immigrant-exclusive federal policies” by publicly stating commitments to protecting undocumented workers in the wake of *Hoffman Plastics*.¹¹²

Agencies’ first task is to encourage compliance with wage and hour laws ex ante, such

“discouraging their participation as private attorneys general in the workplace . . . third party mechanisms must play the role of the enforcer . . . Agencies such as the federal Department of Labor must make immigrant labor industries a priority in their investigations.”).

110 See *Major Laws Administered/Enforced*, U.S. DEP’T LAB., WAGE & HOUR DIVISION (WHD), <http://www.dol.gov/whd/regs/statutes/summary.htm> [<https://perma.cc/WTF6-ESWU>] (last visited Jan. 27, 2016). See also, e.g., *Our Services*, N.Y. ST. DEP’T LAB., <http://labor.ny.gov/about/services.shtm> [<https://perma.cc/9QGD-TVGV>] (last visited Jan. 27, 2016).

111 See, e.g., Shannon Gleeson, *Means to an End: An Assessment of the Status-Blind Approach to Protecting Undocumented Worker Rights*, 57 SOC. PERSP. 301, 310–11 (2014) (finding, through interviews of high level officials in labor standards enforcement agencies in San Jose, California, and Houston, Texas, that agencies have generally ignored workers’ immigration status when the individual makes a workplace-related complaint, in part because the agency must conserve its resources and stay within its jurisdictional mandate of protecting workers).

112 *Id.* at 305 (internal quotations omitted). Each agency noted that it would not extrapolate the Supreme Court’s ruling, which applied on its face only to the NLRA, to apply to the antidiscrimination and wage and hour laws the EEOC and DOL are charged with enforcing, respectively. Press Release, Equal Employment Opportunity Commission, EEOC Reaffirms Commitment to Protecting Undocumented Workers from Discrimination (June 28, 2002), <http://www.eeoc.gov/eeoc/newsroom/release/6-28-02.cfm> [<https://perma.cc/ZR2J-HXJF>] (“[T]he EEOC will seek appropriate relief consistent with the Supreme Court’s ruling in *Hoffman*, but will not, on its own initiative, inquire into a worker’s immigration status or consider an individual’s immigration status when examining the underlying merits of a charge.”); *Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers: Effect of Hoffman Plastics Decision on Laws Enforced by the Wage and Hour Division*, U.S. DEP’T LAB., WAGE & HOUR DIVISION (WHD) (July 2008), <http://www.dol.gov/whd/regs/compliance/whdfs48.htm> [<https://perma.cc/87QA-VKEA>].

as by requiring that employers post “Know Your Rights” bulletins in workplaces.¹¹³ Regulations may increase penalties, including civil penalties and license revocation, for failures to comply with wage and hour laws.¹¹⁴ Agencies responsible for business licensing may revoke or decline to issue or renew licenses for offending businesses, and set the conditions for reinstatement or renewal, such as requiring an employer to disclose the amount of money it owes to its workers in outstanding wages and unpaid judgments, and to pay this amount to obtain the license.¹¹⁵

In addition to shaping employer behavior through regulation, agencies act directly by investigating businesses and bringing lawsuits or prosecutions themselves or in response to complaints filed by individuals. Workers may file administrative claims under FLSA or corresponding state laws with the federal or state DOLs, respectively, after which the agency may investigate the claim and file an action against the employer.¹¹⁶ In 2014, the New York State DOL conducted its first sweep of nail salons in the New York metropolitan area, finding 116 wage violations in an inspection of twenty-nine salons.¹¹⁷ Given the conflicting pressures operating on police asked to investigate wage theft in businesses that hire undocumented immigrants,¹¹⁸ agencies like the DOL, whose jurisdiction is limited to wage law, may be in a better position to use their criminal investigative authority to take control of wage law enforcement.¹¹⁹

However, agencies are likely unable or unwilling to respond fully to the problem of exploitation of undocumented workers. On the most basic level, agencies simply do not have the resources to tackle this problem effectively. The WHD receives annually far more

113 See Letter from New York State Nail Salon Industry Enforcement Task Force to Nail Salon Practitioners (July 1, 2015), <http://www.dos.ny.gov/licensing/appearance/posters/FINAL%20Nail%20Salon%20Practitioner%20Letter%206-24%201pm.pdf> [<https://perma.cc/T3SX-S42G>] (discussing new requirement that nail salons post Workers’ Bill of Rights in a place that is visible to all employees and the public).

114 See, e.g., N.Y. LAB. LAW § 218(1) (McKinney 2015).

115 NELP, WINNING WAGE JUSTICE, *supra* note 20, at 25.

116 29 U.S.C. § 216(c) (providing for administrative actions under FLSA); see also *Claim for Unpaid Wages*, N.Y. ST. DEP’T LAB., DIVISION LAB. STANDARDS, <https://labor.ny.gov/formsdocs/wp/LS223.pdf> [<https://perma.cc/YNS3-9X8E>] (last visited July 1, 2016).

117 Nir, *Nice Nails*, *supra* note 1.

118 See *supra* Part II.A.

119 Lee, *supra* note 20, at 673–74.

complaints than it has the capacity to investigate.¹²⁰ Moreover, agencies appear to have substantial trouble collecting judgments from evasive employers, despite their authority to prosecute criminally, just as private litigants do. Between 2003 and 2013, the New York State DOL was unable to collect over \$101 million in wages it had determined employers owed to their employees.¹²¹ Plus, agency mandates are necessarily a function of the political branches they receive their power from. At the granular level, agency strength in this context depends on the legislature granting the agency specific power to act effectively. For example, an agency will need legal authority to use its licensing function as a sword to regulate wage compliance.¹²²

On a broader level, agency commitment to the workplace rights of undocumented immigrants will undoubtedly change with and during administrations because of policy views regarding immigration, business regulation, and labor policy.¹²³ Proposals to increase regulation of businesses with respect to wage and hour laws, or ramp up enforcement against violators, routinely meet opposition from business owners and legislators representing their interests.¹²⁴ While there may be an informal separation between labor standards enforcement agencies and immigration enforcement agencies, this informality renders the separation susceptible to breakdown with changing administrations.¹²⁵

120 Coleman, *Exploited at the Intersection*, *supra* note 26, at 418. “The WHD received 21,558 FLSA complaints in fiscal year 2008, 26,376 in fiscal year 2009, and 32,916 in fiscal year 2011.” *Id.* See Alexander & Prasad, *supra* note 24, at 1070 n.2 (noting that between 1997 and 2012, private plaintiffs filed forty-eight times the number of cases filed by the EEOC to enforce workplace rights).

121 EMPTY JUDGMENTS, *supra* note 101, at 5.

122 See NELP, WINNING WAGE JUSTICE, *supra* note 20, at 26 (“In some circumstances, the state or local agency that issues a permit or license may not have the legal authority to regulate employers’ satisfaction of unpaid wages and compliance with the wage and hour laws.”).

123 But see Ming H. Chen, *Where You Stand Depends on Where You Sit: Bureaucratic Politics in Federal Workplace Agencies Serving Undocumented Workers*, 33 BERKELEY J. EMP. & LAB. L. 227 (2012) (arguing that federal agencies use their discretion to provide guidance that resists the contraction of immigrant workers’ rights in the courts, motivated by a professional commitment to enforcing labor laws, despite policy preferences).

124 See, e.g., Eric Silver, *Nail Salon Owners Protest Against Stricter Regulations*, GOTHAMIST (Sept. 22, 2015), http://gothamist.com/2015/09/22/nail_salon_owners_protest.php [<https://perma.cc/DCM8-EE3D>].

125 An interagency memorandum of understanding (“MOU”) governs the relationship between the DHS and DOL, which restricts the ability of DHS to initiate immigration enforcement proceedings while the DOL is investigating a labor violation. See Revised Memorandum of Understanding Between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites (Dec. 7, 2011), <http://www.dol.gov/asp/media/reports/dhs-dol-mou.pdf> [<https://perma.cc/Y9ZJ-VGA2>] [hereinafter MOU Between DHS and DOL]. However, the MOU only protects workers during the pendency of a DOL investigation, and does not

D. Market-Based Solutions

Advocates should not overlook the position that market forces are better at incentivizing employers to pay their workers proper wages than the law. A market-based solution may be the antithesis of a legal tool, or a necessary component to any effective policymaking on this issue. Putting the larger economic and philosophical question of how the law and markets interact aside,¹²⁶ I consider a market-based approach as an important potential path to improved working conditions.

Reliance on this tool often translates into advocates imploring consumers to shoulder the task of monitoring the labor practices of the businesses they patronize, either through face-to-face interactions when purchasing goods or services, or in response to investigative reporting, and making their purchasing decisions accordingly.¹²⁷ The success of a market-based approach depends on the premise that business owners will adapt to the demands of consumers and shaming by other monitors, such as advocacy groups, before they comply with regulations or court orders. While regulations and judgments could put many of these small companies out of business, adapting to a consumer-driven model of wage fairness will allow them to price their services appropriately to both pay their workers and stay in business.¹²⁸ By acknowledging that citizens and corporations contribute to the problem

preclude immigration enforcement while workers bring other kinds of actions, like state or federal litigation. See Note, Julie Braker, *Navigating the Relationship Between the DHS and the DOL: The Need for Federal Legislation to Protect Immigrant Workers' Rights*, 46 COLUM. J.L. & SOC. PROBS. 329, 347 (2013).

126 For one perspective on this multifaceted question, see generally Curtis J. Milhaupt, *Beyond Legal Origin: Rethinking Law's Relationship to the Economy—Implications for Policy*, 57 AM. J. COMP. L. 831 (2009).

127 See, e.g., Sarah Maslin Nir, *3 Ways to Be a Socially Conscious Nail Salon Customer*, N.Y. TIMES, May 7, 2015, http://www.nytimes.com/2015/05/08/nyregion/3-ways-to-be-a-socially-conscious-nail-salon-customer.html?_r=0 [https://perma.cc/E536-HTGV]. Another version of the market-based solution is one that presumes that workers can use their power to leave a workplace they find exploitative. See, e.g., Alexander & Prasad, *supra* note 24, at 1075 (discussing Albert Hirschman's position that people facing workplace problems have three options: exit, voice, and loyalty). This is not a helpful framework for workplaces employing primarily undocumented immigrants, who, out of all employees, likely have the least bargaining power to use their potential exit as leverage. This tool also includes monitoring by unions and worker centers, but only to the extent that such monitoring results in pressure on the business to change its practices, rather than a legal action to force compliance. The role of union-led collective bargaining is outside the scope of this paper, given the complex relationship between unions and undocumented immigrant workers. See Esther Yu-Hsi Lee, *Labor Unions Move to Protect Immigrants, Regardless of Legal Status*, THINKPROGRESS (Mar. 26, 2015), <http://thinkprogress.org/immigration/2015/03/26/3638255/unions-increasingly-bargaining-protect-undocumented-immigrants/> [https://perma.cc/U78M-7AR4].

128 After Nir's exposé of nail salons, many publications urged consumers to pay higher prices for services

of wage theft, this model takes into account the structural forces that lead to systemic exploitation of undocumented immigrants.¹²⁹ A market-based approach would also have the benefit of greater adaptability to changing conditions than static regulation.

But as critics of capitalism point out, a consumer-driven model of change is not enough, since neoliberal economic policies are at the core of industries that rely primarily on cheap immigrant labor.¹³⁰ Thus, appealing to consumers' power as market-drivers is unlikely to change a system whose exploitative features emerged to cater to these same consumers.¹³¹ Moreover, direct action by consumers, on its own, may inadvertently hurt the workers, and larger immigrant communities, that the consumers sympathize with: boycotting a business will inevitably make its employees earn less money absent a change in its pricing structure; choosing to avoid businesses that are primarily owned by members of a particular immigrant group, such as the nail salons that Korean immigrants own in New York City, could exacerbate xenophobia with respect to that group.¹³² Without adequate protection from retaliation, there is a good chance employees will be dissuaded from telling consumers, reporters, and other monitors about their experiences. Thus, the specter of retaliation has the power to prevent the dissemination of information to consumers, which the market-based approach relies on.

because of the exploitation that made rock-bottom prices possible. *See, e.g.*, Amy Westervelt, *The High Price of Cheap Manicures: What Can Consumers Do?*, GUARDIAN (May 12, 2015), <http://www.theguardian.com/lifeandstyle/2015/may/12/cheap-manicures-consumers-nail-salons> [<https://perma.cc/WT3T-JMN3>]; Jordan Weissman, *Worried that Your Manicurist is Being Exploited? Tipping More Probably Won't Help*, SLATE (May 7, 2015), http://www.slate.com/blogs/moneybox/2015/05/07/new_york_times_nail_salon_investigation_tipping_your_manicurist_isn_t_going.html [<https://perma.cc/8EQ2-VXZR>] (“As a rule, if you are paying an immigrant who can’t speak English a vanishingly small sum in order to perform a labor-intensive service, there is a strong chance that something isn’t above board in the transaction and that some degree of human trafficking or wage violations might be involved.”).

129 *See* Lee, *supra* note 20, at 677.

130 *See, e.g.*, Maura Toro-Morn, et al., *supra* note 25, at 3–4 (“Neoliberal economic and political policies drive women to migrate to the global North, lock them into low-wage labor, deny them and their families of legal protections, criminalize their undocumented status, and threaten or follow through with deportation and family separation.”); Tayyab Mahmud, *Precarious Existence and Capitalism: A Permanent State of Exception*, 44 S.W. L. REV. 699, 721 (2014) (“Neoliberal restructuring of the global economy has produced a virtually inexhaustible immigrant labor reserve.”).

131 *See, e.g.*, Weissman, *supra* note 128 (“Theoretically, that’s why we have labor laws in the first place—because the market on its own isn’t going to protect people who can’t protect themselves.”).

132 *See id.*

Given the flaws in each of the tools discussed above, I argue in the next Part for state-level protections to respond to retaliation specific to immigration status. I first argue that anti-retaliation protections would render each of the available legal regimes more effective. I discuss existing federal law protections, which insufficiently protect against retaliation or exacerbate the victimization of immigrant women. I then argue for particular state-level policies, based on California's recent legislation.

III. States Should Enact Anti-Retaliation Policies Specific to Immigration Status

A. Stronger Anti-Retaliation Protections Would Render Each of the Available Legal Regimes More Effective

Ensuring that there are strong protections against retaliation, especially retaliation based on immigration status, would make each of the four tools discussed above more effective, and should be a central focus in policymaking to curb wage theft. An approach focusing on anti-retaliation acknowledges that the anti-wage theft enforcement regime is, for better or worse, one of "bottom-up" enforcement, which relies on the individual to come forward and tell a story, whether by notifying the police, a court, or an agency, of the abuse she has suffered.¹³³ For this enforcement regime to be effective, the individual must have sufficient incentives to come forward, and therefore must not face consequences as a direct result of telling her complete story, especially if she is an innocent actor.¹³⁴

As it stands, the wage theft enforcement regime does not adequately guard against retaliation, as even the threat of retaliation chills workers from coming forward with complaints.¹³⁵ In general, retaliation by employers preserves existing power structures, and

133 See Alexander & Prasad, *supra* note 24, at 1071 ("Workplace law enforcement . . . depends significantly on worker 'voice,' with workers themselves identifying violations of their rights and making claims to enforce them.").

134 *Id.* at 1072.

135 See, e.g., David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 COMP. LAB. L. & POL'Y J. 59, 91 (2005) (analyzing complaints under FLSA and the Occupational Safety and Health Act, concluding that "workers that feel vulnerable to exploitation are less likely to use their rights—these include immigrant workers, those with less education or fewer skills, and those in smaller workplaces or in sectors prone to a high degree of informal work arrangements"). *But see* Allissa Wickham, *Immigration Status Won't Block Uptick in Nail Worker Suits*, LAW360 (May 14, 2015), <http://www.law360.com/articles/655934/immigration-status-won-t-block-uptick-in-nail-worker-suits> [https://perma.cc/SJ93-TW93] ("Although attorneys say that, historically, many immigrants have been hesitant to file lawsuits, they believe [New York's] new measures [addressing wage theft in nail salons] will lead to an uptick in litigation from nail salon workers, as more employees learn about their rights.").

is therefore “more likely to occur against vulnerable employees who lack the support of organizational powerbrokers,” such as undocumented women workers.¹³⁶ As Kathleen Kim argues, employers often deploy immigration restrictions to coerce undocumented workers into accepting substandard working conditions, resulting in a free labor problem.¹³⁷ In the study of low-wage workers discussed above, forty-three percent of workers who had experienced a workplace problem within the previous year decided not to make a claim to either their employer or a law enforcement agency, first and foremost because they feared employer retaliation.¹³⁸ Another study of restaurant workers found that both explicit employer intimidation, as well as an “ever-present implicit fear of deportation,” inhibited undocumented workers from making claims in the workplace.¹³⁹ These fears are not unfounded. As Alexander and Prasad concluded, about thirty-five percent of workers that made claims inevitably suffered some form of unlawful retaliation by their employers, including calls to the police or immigration.¹⁴⁰

A strong anti-retaliation regime defies the exploitative employer’s attempt to enforce silence among workers by breaking down the power hierarchy between documented employer and undocumented employee that retaliation and its threat preserve in the low-wage workplace. A strong anti-retaliation regime is necessary for each of the above tools to operate effectively, but also for workers to have meaningful choices about how to engage in advocacy against wage theft. Anti-retaliation protections would guard against the race to the police between the exploitative employer and the undocumented employee. They would recognize and attempt to negate the chilling effect that even the specter of retaliation has for an undocumented immigrant considering filing a civil lawsuit against her employer. Although judges in practice tend to disallow employers from raising the issue of their employees’ immigration status in civil wage theft cases in an attempt to neutralize this threat,¹⁴¹ a stronger ex ante prohibition on immigration-related threats would acknowledge that the damage caused by retaliation could already be complete before a judge considers the issue. Anti-retaliation protections would encourage greater cooperation between individual workers and agencies investigating wage theft, making up for the weak promise of

136 Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 36–39 (2005).

137 Kathleen Kim, *Beyond Coercion*, 62 UCLA L. REV. 1558, 1569–82 (2015).

138 Alexander & Prasad, *supra* note 24, at 1073.

139 Shannon Gleeson, *Labor Rights for All? The Role of Undocumented Immigrant Status for Worker Claims Making*, 35 L. & SOC. INQUIRY 561, 580 (2010).

140 Alexander & Prasad, *supra* note 24, at 1091.

141 LeRoy, *Remedies*, *supra* note 95.

an informal separation between labor standards enforcement agencies and immigration authorities. Finally, stronger anti-retaliation laws would boost the worker's bargaining position in the market, by empowering her to negotiate unfair employment terms without fear of being targeted by the employer. Overall, though various actors have taken steps to address the problem of employer retaliation against undocumented workers, additional changes are needed, as "full and secure protection from retaliation is critical for the effectiveness of a rights-claiming system."¹⁴²

B. Federal Law Insufficiently Protects Against Retaliation or Exacerbates the Victimization of Immigrant Women

1. Federal Anti-Retaliation Protections Are Insufficient

Federal law's anti-retaliation protections provide a weak promise for immigrant workers. Under federal law, retaliation against workers who assert workplace rights is unlawful.¹⁴³ DOL has clarified that the retaliation prohibition applies regardless of workers' immigration status, and covers calls to immigration authorities following a worker's complaint.¹⁴⁴ Nonetheless, besides its under-enforcement, one weakness is that federal law does not protect against retaliation carried out by a friend or agent of the employer. Federal law also generally does not protect against anticipatory retaliation, or "actions taken against workers in anticipation that they might enforce their legal rights in the future," rather than in reaction to an assertion of rights.¹⁴⁵

142 Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 905 (2008).

143 FLSA's prohibition against retaliation makes it unlawful "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding" under FLSA, or has "testified or is about to testify in any such proceeding." 29 U.S.C. § 215(a)(3). The Supreme Court has held this prohibition to encompass oral as well as written complaints, so long as the complaint is "sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protection by the statute and a call for their protection." *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 14 (2011).

144 *Fact Sheet: Retaliation Based on Exercise of Workplace Rights is Unlawful*, U.S. DEP'T LAB., WAGE & HOUR DIVISION (WHD), <http://www.dol.gov/dol/fact-sheet/immigration/RetaliationBasedExerciseWorkplaceRightsUnlawful.htm> [<https://perma.cc/8A3J-2KHG>] (last visited Jan. 8, 2016).

145 See Alexander, *supra* note 40, at 780. Alexander provides four shortcomings of employment and labor law that result in little to no protection against anticipatory retaliation: 1) that anti-retaliation provisions are structured to be reactive, in that they are activated in response to an adverse employment action that occurs after a protected activity; 2) courts are reluctant to accept unfulfilled threats as "adverse employment actions"; 3)

The federal government has recognized that employers sometimes call immigration authorities only once undocumented workers make complaints to labor standards enforcement agencies. As a result, in 2011 DHS and DOL revised the Memorandum of Understanding (“MOU”) that governs the relationship between the two agencies.¹⁴⁶ In general, this MOU prohibits ICE from conducting immigration-related investigations while DOL is investigating a worksite for labor violations.¹⁴⁷ However, the MOU fails to provide complete protection from DHS undertaking an immigration raid as a result of workplace-related complaints. It is not codified and unenforceable, such that the cooperation between the two agencies is susceptible to change as agencies see fit.¹⁴⁸

ICE also has its own internal protocol that requires immigration agents to seek approval from the ICE director before continuing an investigation where it appears that an employer is using DHS’s immigration enforcement authority as a weapon in a labor dispute.¹⁴⁹ Like the MOU, this “Operating Instruction” (“OI”) is merely an internal policy that is not codified and can be changed at any time.¹⁵⁰ However, local ICE officials are often unaware of the OI, or use the discretion afforded under the policy to rely on the employer’s call to DHS to trigger a later immigration enforcement action.¹⁵¹ Like the federal protections against retaliation delineated above, the OI also limits immigration enforcement only in instances of retaliation by employers, and does not cover retaliation by their agents or friends.¹⁵²

The Obama Administration has proffered a third executive mechanism for protecting workers from retaliation based on immigration status. In a 2011 memorandum, ICE Director John Morton instructed immigration officers to “exercise all appropriate discretion” in

lower courts fail to consider allegedly retaliatory acts in the context of the circumstances; and 4) the NLRA is also reactive, requiring workers to first engage in protected activity in order to access a remedy. *Id.* at 786–88.

146 See MOU Between DHS and DOL, *supra* note 125.

147 See *id.*; Braker, *supra* note 125, at 333.

148 NELP, WORKERS’ RIGHTS ON ICE, *supra* note 91, at 22–23. See also MOU Between DHS and DOL, *supra* note 125, at ¶ V(D); Braker, *supra* note 125, at 348.

149 U.S. Citizenship & Immigration Services, *Operating Instruction 287.3a: Questioning Persons During Labor Disputes*, USCIS.GOV, <http://www.uscis.gov/iframe/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-53690.html> [https://perma.cc/4CKY-XQ9D] (last visited Feb. 21, 2016).

150 NELP, WORKERS’ RIGHTS ON ICE, *supra* note 91, at 19.

151 *Id.*

152 *Id.*

cases of “victims of crime, witnesses to crime, and individuals pursuing legitimate civil rights complaints,” with particular attention to be paid to “individuals engaging in a protected activity related to civil or other rights,” such as exercising workplace rights.¹⁵³ The implementation of this policy, however, depends solely on the agency’s willingness to exercise this discretion. Only one year after the memorandum’s release, workers’ advocates called the policy a failure, observing that ICE only granted discretion—a mere temporary reprieve—in 1.5% of the 288,000 cases it reviewed that year.¹⁵⁴ The weak firewall between DOL and DHS that the federal government assured it has built does not help alleviate fears in immigrant communities, where immigrant workers still face the reality of ICE raids on workplaces.¹⁵⁵

A bill known as the Protecting Our Workers from Exploitation and Retaliation (“POWER”) Act attempts to rectify many of the problems in the current federal anti-retaliation scheme with respect to immigrant workers.¹⁵⁶ The POWER Act expands U Visa eligibility criteria to explicitly include individuals who have suffered workplace violations,¹⁵⁷ and adds individuals who have been threatened by their employers or reasonably fear retaliation to the list of qualifying individuals.¹⁵⁸ As discussed below, without a corresponding increase in the statutory cap for U Visas, however, these measures will fail to protect the many immigrant workers that experience these harms. The POWER Act also formalizes the firewall between DHS and DOL, formally requiring DHS to stay pending deportations

153 U.S. Immigr. & Customs Enf’t., U.S. Immigration and Customs Enforcement Memorandum: Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (June 17, 2011), <https://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf> [<https://perma.cc/UGZ5-U74R>].

154 NELP, WORKERS’ RIGHTS ON ICE, *supra* note 91, at 25 (citing Am. Immigration Lawyers Ass’n Press Release: Prosecutorial Discretion Initiative Falls Short (June 7, 2012), <http://www.aila.org/advo-media/press-releases/2012/dhs-pros-discretion-initiative-falls-short> [<https://perma.cc/GFT4-V68E>]).

155 Saucedo, *A New “U”*, *supra* note 99, at 896–97; Stephen Lemons, *Joe Arpaio-Fave Danny’s Family Car Wash Raided By ICE*, PHOENIX NEW TIMES (Aug. 17, 2013), <http://www.phoenixnewtimes.com/blogs/joe-arpaio-fave-dannys-family-car-wash-raided-by-ice-w-updates-6498776> [<https://perma.cc/LA9K-MMMS>].

156 Protect Our Workers from Exploitation and Retaliation Act, H.R. 2169, 112th Cong. (2011), <https://www.congress.gov/bill/112th-congress/house-bill/2169> [<https://perma.cc/8N46-H2KF>].

157 *See infra* Part III.B.2.

158 Braker, *supra* note 125, at 356–57.

of individuals who filed claims with DOL.¹⁵⁹ This bill was last submitted in 2011, with no action after its referral to committee.¹⁶⁰

2. The U Visa's Victimization of Immigrant Women

As federal statutes and agency action have only halfheartedly attempted to protect workers from employers who use immigration enforcement as a sword in workplace disputes, advocates frequently push for greater use of a less risky federal remedy: the U Visa.¹⁶¹ The U Visa protects victims of particular crimes from deportation by granting them temporary non-immigrant status, achieving the government's dual purpose of targeting crime while providing humanitarian relief.¹⁶² Three years after receiving a U Visa, an individual is eligible for legal permanent resident status.¹⁶³ Recipients receive work authorization for the duration of the visa.¹⁶⁴ Thus, the U Visa appears to be a fitting remedy for workers who have been the victim of crimes at work and who fear retaliatory deportation.

To qualify for a U Visa, an individual must be a victim of an enumerated crime, and

159 *Id.* at 357–58.

160 Protect Our Workers from Exploitation and Retaliation Act, H.R. 2169, 112th Cong. (2011), <https://www.congress.gov/bill/112th-congress/house-bill/2169/related-bills> [<https://perma.cc/3RFR-MHJP>].

161 *See, e.g.*, Eunice Hyunhye Cho, Giselle A. Hass & Leticia M. Saucedo, *A New Understanding of Substantial Abuse: Evaluating Harm in U Visa Petitions for Immigrant Victims of Workplace Crime*, 29 GEO. IMMIGR. L.J. 1 (2014) [hereinafter Cho, et al., *A New Understanding*] (providing a framework to evaluate abuse suffered by victims of workplace crime in the U Visa context, arguing for a distinct analysis for workplace crimes from that employed for survivors of domestic violence); Llezlie Green Coleman, *Procedural Hurdles and Thwarted Efficiency: Immigration Relief in Wage and Hour Collective Actions*, 16 HARV. LATINO L. REV. 1 (2013) [hereinafter Coleman, *Procedural Hurdles*] (arguing that judges should certify U Visa applications for undocumented plaintiffs that participate in discovery in FLSA collective actions); Saucedo, *Immigration Enforcement Versus Employment Law Enforcement*, *supra* note 24 (arguing for strengthening the U Visa program to protect undocumented immigrants who are victims of workplace crimes, especially in cases where employers have avoided the employer sanctions under immigration law); Saucedo, *A New "U"*, *supra* note 99, at 891 (arguing that the U Visa can act as a tool for collective change for undocumented workers who have been unable to collectively organize); Maria L. Ontiveros, *A Strategic Plan for Using the Thirteenth Amendment to Protect Immigrant Workers*, 27 WIS. J. L. GENDER & SOC'Y 133, 154–55 (2012).

162 Saucedo, *Immigration Enforcement Versus Employment Law Enforcement*, *supra* note 24, at 311.

163 *Green Card for a Victim of a Crime (U Nonimmigrant)*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Mar. 23, 2011), <https://www.uscis.gov/green-card/other-ways-get-green-card/green-card-victim-crime-u-nonimmigrant> [<https://perma.cc/2VGG-982Y>].

164 8 U.S.C. § 1184(p)(3)(B).

must have suffered substantial physical or mental abuse because of that crime.¹⁶⁵ The U Visa also requires certification by a federal, state, or local law enforcement agency or official, such as a prosecutor, police officer, or a judge, that the applicant has been or is likely to be helpful in investigating or prosecuting the crime.¹⁶⁶ DOL, a civil law enforcement agency with criminal investigative jurisdiction, may act as a certifying law enforcement agent for a U Visa.¹⁶⁷ In recent years, state agencies like the New York Department of Labor have also released protocols for certifying U Visa petitions.¹⁶⁸ As of April 2015, the WHD has been certifying applications for eight enumerated crimes that frequently occur in the workplace: involuntary servitude, peonage (debt servitude), trafficking, obstruction of justice, witness tampering, fraud in foreign labor contracting, extortion, and forced labor.¹⁶⁹

As scholars and advocates have argued, the U Visa has the potential to be a useful tool in the context of wage theft in immigrant-dominated industries. The U Visa proved to be a crucial remedy in *Moreno-Lopez*,¹⁷⁰ in which plaintiffs in a civil workplace rights suit found themselves detained by immigration authorities and charged with crimes related to working without authorization shortly after filing suit.¹⁷¹ In that case, the plaintiffs were eventually granted U Visas after the EEOC certified that they were victims of extortion and had been helpful to the agency in its investigation of the employer.¹⁷² Advocates push-

165 8 U.S.C. § 1101(a)(15)(U)(i). The attempt, conspiracy, or solicitation of any of the enumerated criminal acts may serve as the basis for U Visa eligibility. Cho, et al., *A New Understanding*, *supra* note 161 at 7–8.

166 *Id.* at § 1101(a)(15)(U)(i)(III).

167 8 C.F.R. § 214.14(a)(2) (West 2015); *see also Fact Sheet: Secretary Solis Announces the Department to Exercise Its Authority to Certify U Visas*, U.S. DEP'T LAB., <http://www.dol.gov/opa/media/press/opa/opa20100312-fs.htm> [<https://perma.cc/V5FZ-7SFZ>] (last visited Jan. 10, 2016).

168 Cho, et al., *A New Understanding*, *supra* note 161, at 8; N.Y. ST. DEP'T LAB., DIVISION IMMIGR. POLICIES & AFFAIRS, <https://labor.ny.gov/immigrants/service.shtm> [<https://perma.cc/R3G8-74JS>] (last visited Jan. 11, 2016).

169 *Id.* at § 1101(a)(15)(U)(iii); *see also U and T Visa Process and Protocols, Question-Answer*, U.S. DEP'T LAB., <http://www.dol.gov/whd/immigration/utvisa-faq.htm#7> [<https://perma.cc/EMW6-JENN>] (last visited Jan. 11, 2016); *see also* Cho, et al., *A New Understanding*, *supra* note 161, at 32–43. Currently, the enumerated workplace-related crimes do not explicitly include wage and hour violations or collective bargaining violations. Saucedo, *Immigration Enforcement Versus Employment Law Enforcement*, *supra* note 24, at 320–21. Victims of these crimes may be eligible for a U Visa if they experienced extortion, as the *Moreno-Lopez* plaintiffs did after complaining of FLSA violations.

170 *See supra* note 92.

171 Saucedo, *Immigration Enforcement Versus Employment Law Enforcement*, *supra* note 24, at 309.

172 *Id.* at 314.

ing for increased use of U Visas for victims of workplace crime argue that, despite the U Visa's more frequent use on behalf of survivors of domestic violence, Congress intended to use the U Visa to protect victims of workplace crimes, evinced by the list of qualifying crimes and the fact that DOL and the EEOC are both empowered to provide law enforcement certification.¹⁷³ To effectuate Congress's intent, therefore, advocates argue that U Visas should be readily available to immigrant workers that participate in collective actions against abusive employers; though "not a traditional remedy under either Title VII or the FLSA, granting U Visa status should be considered as part of the make-whole structure in workplace violation cases."¹⁷⁴ Only with a potential pathway to citizenship are low-wage undocumented workers likely to participate in legal actions to vindicate their rights, and therefore participate in the collective enforcement of wage and hour laws.¹⁷⁵ These advocates persuasively contend that greater use of the U Visa in workplace rights cases would provide crucial leverage in the employer-employee relationship for immigrant workers, by providing "legal status as a form of reparation for suffering exploitation rising to the level of criminal activity."¹⁷⁶

Through the increased use of the U Visa, labor standards enforcement agencies also have the power to illuminate the unique harms undocumented workers experience in the workplace, and the forces that dissuade them from coming forward with workplace complaints, educating government agencies interested in creating responsive policies.¹⁷⁷ As advocates have observed, United States Citizenship and Immigration Services ("USCIS") adjudicators of U Visas have more experience identifying "substantial harm" in the context of domestic violence than in the workplace, after having extensive training on domestic violence, sexual assault, and human trafficking.¹⁷⁸ As a result, they risk viewing the "substantial abuse" element in a workplace-crime-based petition through the lens of domestic violence, and may more readily identify fact patterns typical of domestic violence, to the

173 *Id.* at 315–16.

174 Saucedo, "A New U", *supra* note 99, at 904; *see also* Coleman, *Procedural Hurdles*, *supra* note 161, at 31–34.

175 Coleman, *Procedural Hurdles*, *supra* note 161, at 9.

176 Saucedo, "A New U", *supra* note 99, at 904.

177 *See, e.g.*, Cho, et al., *A New Understanding*, *supra* note 161, at 15–31 (providing a psychological framework for better understanding undocumented immigrant workers' experiences of abuse in the workplace, including the factors that prevent healthy coping with workplace-induced stress).

178 Cho, et al., *A New Understanding*, *supra* note 161, at 10–11.

exclusion of narratives that typify workplace crimes.¹⁷⁹

Though proposals for increased reliance on the U Visa note the program's current flaws,¹⁸⁰ the present state of the immigration law landscape and the extent to which the U Visa perpetuates a victim-based remedy should caution against wholesale reliance on this particular remedy in the wage theft context, especially for low-wage, female immigrant workers. First, the annual statutory cap on U Visas, currently set at 10,000 visas, is unlikely to increase soon, given the political discourse surrounding immigration reform today. The cap was less of a concern a decade ago, but in fiscal year 2015, USCIS approved the maximum number of U Visas before the end of the year for the sixth year in a row.¹⁸¹ In 2013, the government reached the cap less than three months into the federal fiscal year.¹⁸² Meanwhile, the number of applicants has increased each year: in 2010 there were 10,742 applicants, in 2011, 16,768, and in 2012, 24,788.¹⁸³ Efforts to increase the cap seem unlikely to change the state of affairs today more than ever. In 2013, Senator Patrick Leahy (D-VT) attempted to include a provision to raise the cap to 15,000 in the bill to reauthorize the Violence Against Women Act ("VAWA"), but was met with opposition from Republican members of Congress, leading him to take this provision out of the bill.¹⁸⁴ Given today's state of affairs, I advocate for greater use of anti-retaliation policies in part because these would expand protection for all immigrant women workers, and not just those who are lucky enough to receive a U Visa.

Increased reliance on the U Visa could also bring unpredictable results, as broad discretion afforded to certifying law enforcement agencies leads to disparate implementation

179 *Id.* at 11.

180 *See, e.g.,* Saucedo, *A New "U"*, *supra* note 99, at 944–52.

181 *USCIS Approves 10,000 U Visas for 6th Straight Fiscal Year*, USCIS.GOV, <http://www.uscis.gov/news/uscis-approves-10000-u-visas-6th-straight-fiscal-year> [<https://perma.cc/HN8Q-R72F>] (last visited Jan. 11, 2016).

182 Jennifer Scarborough & Lisa Koop, *U.S. Reaches U Visa Cap in Less Than 3 Months; Immigrant Victims Left in Limbo*, NAT'L IMMIGRANT JUST. CTR., (Dec. 18, 2013), <https://www.immigrantjustice.org/staff/blog/us-reaches-u-visa-cap-less-3-months-immigrant-victims-left-limbo#.VpP82ZMrJAY> [<https://perma.cc/J6UA-S99G>].

183 Cristina Costantini, *The Problem with the 'Victim Visa'*, ABC NEWS (Jan. 31, 2013), http://abcnews.go.com/ABC_Univision/visas-problem-victim-visa/story?id=18357347 [<https://perma.cc/RJ8S-5UA5>].

184 *Id.*

across the country.¹⁸⁵ As a result, individuals with identical fact patterns may have different outcomes in receiving a signed certification, based only on where they live and their local law enforcement agency's policy with respect to certifying U Visas.¹⁸⁶ Additionally, the fact that the U Visa adjudication process is highly individualized may be ill-suited for workers engaged in broad organizing campaigns, since all workers pushing for accountability for specific abusive employers may not have encountered similar treatment by the employer to warrant similar U Visa outcomes.¹⁸⁷ The U Visa is focused only on protecting the applicant—undoubtedly a worthy goal—but does not deter or punish employers, except by making investigations into their criminal activity more effective with the applicant's help.¹⁸⁸ In reality, a successful U Visa application may do nothing to curb an abusive employer's future violations or change an exploitative labor landscape.

From a feminist perspective, however, the chief problem with the U Visa remedy is that it perpetuates a victim-based model of recourse that constrains applicants' agency in the critical process of retelling their individual narratives of exploitation. The U Visa is a quintessential "pro-victim" federal immigration remedy: it provides legal status only to those applicants who prove they deserve legal status because they were sufficiently victimized. The reliance on individual law enforcement agencies' discretion in the U Visa scheme means that applicants need to retell their narratives in a way that conforms to agencies' expectations of what a victim of workplace abuse, and particularly an undocumented immigrant low-wage worker, looks like. In order to be successful, then, applicants need to ensure that their story fits into the larger societal narratives attached to the "good immigrant," while eschewing the tropes adjudicators have come to associate with the "bad immigrant."¹⁸⁹ As Elizabeth Keyes lays out these dichotomous narratives, the "good immigrant" is

185 See generally, UNC SCH. OF LAW IMMIGRATION/HUMAN RIGHTS POLICY CLINIC, THE POLITICAL GEOGRAPHY OF THE U VISA: ELIGIBILITY AS A MATTER OF LOCALE, <http://www.law.unc.edu/documents/clinicalprograms/uvisa/fullreport.pdf> [<https://perma.cc/BZ56-QEL3>]. The problem of local discretion resulting in arbitrarily disparate results may be one argument for a stronger federal remedy, rather than increasing state-level protections.

186 See, e.g., *id.* at 14 (providing data identifying the most common reasons for which local law enforcement agencies refused to issue I-918B certification), 18–19 (providing examples of local law enforcement agencies that refused to issue certifications as a matter of local agency policy).

187 NAT'L EMP'T LAW PROJECT, THE U-VISA: A POTENTIAL IMMIGRATION REMEDY FOR IMMIGRANT WORKERS FACING LABOR ABUSE 5 (2014), <http://www.nelp.org/content/uploads/2015/03/UVisa.pdf?nocdn=1> [<https://perma.cc/BK4E-CLUS>].

188 Parra, *supra* note 35, at 120 (2015).

189 See Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the*

hard working and came to the United States in search of the American Dream, while the “bad immigrant” represents all of the American public’s fears regarding poor, troubled, or criminal immigrants.¹⁹⁰ The benefit for the “good immigrant” is a non-adversarial path to legal status.¹⁹¹ The final decision is merely a “matter of grace” that “depend[s] heavily upon the power and resonance of the narratives that individual immigrants can convey to the fact-finder.”¹⁹²

This process forces the woman that experienced workplace exploitation to convey her story in a way that magnifies her own innocent victimization to the greatest extent possible: she had no other choice but to take this job, or she was tricked into accepting unfair employment terms, and she certainly did not participate in the exploitation of other workers. Moreover, she likely must magnify her own fragility, and downplay her strength, when arguing that the wage theft she suffered amounted to “substantial physical or mental abuse.” By amplifying all of her features that mirror the stereotypes associated with the immigrant victim, and correspondingly minimizing any features that deviate from this narrative, she is likely re-victimized in the U Visa process as her individual narrative is rendered invisible. This harm is individualized, as the applicant “must see herself as a victim,”¹⁹³ and group-based, as the process “sets an exceptionally high bar for who merits membership in American society.”¹⁹⁴ Some advocates identify the potential for increased reliance on U Visas to perpetuate a victim-based model of immigration law as a necessary evil of an imperfect but overall effective policy.¹⁹⁵ But low-wage undocumented female workers, the majority of whom are Latina or Asian, have had the story of their existence in the United States

U.S. Immigration System, 26 GEO. IMMIGR. L.J. 207, 226 (2012); Grace Chang, *This is What Trafficking Looks Like*, in IMMIGRANT WOMEN WORKERS IN THE NEOLIBERAL AGE 56, 68–69 (Nilda Flores-González et al. eds., 2013); Michael Kagan, *Immigrant Victims, Immigrant Accusers*, 48 U. MICH. J.L. REFORM 915, 929 (2015).

190 Keyes, *supra* note 189, at 216–17.

191 *Id.* at 236.

192 *Id.* at 211.

193 Stewart Chang, *Feminism in Yellowface*, 38 HARV. J.L. & GENDER 235, 256 (2015). *See also* Kristin Bumiller, *Victims in the Shadow of the Law: A Critique of the Model of Legal Protection*, 12 SIGNS 421 (1987) (examining the social-psychological effects of discrimination, including the formation of an “ethic of survival” which at times entails “dread[ing] [] the status of ‘being a victim of discrimination,’ a role that seizes and marks its possessor”).

194 Keyes, *supra* note 189, at 221.

195 *See, e.g.*, Saucedo, *Immigration Enforcement Versus Employment Law Enforcement*, *supra* note 24, at 324.

largely told through stereotypes. A feminist perspective to policy-making counsels caution for increased reliance on the U Visa, suggesting instead that a remedy that creates space for individualized narratives and agency, rather than victimization, is needed.¹⁹⁶

C. States Have an Opportunity to Legislate with Respect to Retaliation against Undocumented Workers

As federal employment and labor law is unlikely to move forward soon to better protect undocumented immigrants, and especially immigrant women workers,¹⁹⁷ states have an opportunity to provide stronger protections for undocumented immigrant workers.

States have been able to depart from baseline federal employment and labor protections to provide additional protections to their workers, despite the fact that the federal labor law scheme is designed to preempt state regulation of labor.¹⁹⁸ Embodying the role of “states as laboratories” in the federal system,¹⁹⁹ several states have gone well beyond the federal standard in setting the minimum wage.²⁰⁰ Even after the Supreme Court rendered its decision in *Hoffman Plastics*, some states, like New York, expressed disagreement and continued to provide protections to undocumented workers in court, based on state law.²⁰¹

States have also legislated regarding the rights of undocumented immigrants, despite the fact that immigration is traditionally an area of federal policy.²⁰² These policies have

196 See *infra* Part III.D.

197 See, e.g., Parra, *supra* note 35, at 119–20 (discussing recent federal gridlock on immigration policy as a basis for state-level policy reform).

198 See Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1172–74 (2011).

199 *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

200 See *State Minimum Wages/2016 Minimum Wage By State*, NAT’L CONF. ST. LEGISLATURES (Jan. 1, 2016), <http://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx#1> [<https://perma.cc/94M4-UQSK>] (“Currently, 29 states and D.C. have minimum wages above the federal minimum wage of \$7.25 per hour.”).

201 See *Madeira v. Affordable Hous. Found., Inc.*, 315 F. Supp. 2d 504, 507 (S.D.N.Y. 2004); *Majlinger v. Cassino Contracting Corp.*, 25 A.D.3d 14, 24 (App. Div. 2005).

202 While a state amending employment laws to include an explicit statement that anti-retaliation protections apply without regard to immigration status, or defining retaliation to explicitly include threatening a worker with deportation or calling the immigration authorities, likely does not entail legislating in the area of immigration policy, it is not far-fetched to imagine that a state legislator opposed to these changes might

the potential to shape the national conversation on immigration policy, as they “more often than not . . . represent the beginning of a broader political negotiation as states seek to effectuate legal change more widely.”²⁰³ Currently, anti-immigrant-worker sentiment has manifested in the states in calls to criminalize unauthorized work by undocumented immigrants through state-level identity theft statutes.²⁰⁴ State-level anti-retaliation policies that explicitly protect undocumented workers could serve as a powerful divergence from these anti-immigrant laws, perhaps also influencing future federal policymaking.²⁰⁵ Moreover, states, with input from municipalities that most directly interact with affected communities, are better able to consider policy solutions that address concerns specific to their own populations and industries, recognizing that there may not be a one-size-fits-all solution to wage theft in immigrant-dominated workplaces.

However, there are potential drawbacks to prioritizing anti-retaliation protections in the states. A focus on anti-retaliation preserves the “bottom-up” system of enforcement of workplace rights that relies on workers who are brave enough to come forward to tell the stories of the retaliation they experienced. A worker must still pursue a claim of retaliation in order to enforce the prohibition, whether through a civil suit or notifying law enforcement, just like she must pursue the initial claim of wage theft. Thus, the below recommendations may be critiqued for assuming that stronger anti-retaliation provisions in state laws will be effective in sending a message to employers, so that workers are not merely left with the additional burden of pursuing retaliation claims.²⁰⁶ Statutory anti-retaliation

argue that protecting immigrants is within the province of the federal government only. In reality, “[f]or the past few decades, federal immigration enforcement strategies have become increasingly reliant on state and local participation. Moreover, as federal immigration controls have steadily expanded beyond admission quotas and entry requirements at the border, into domestic areas traditionally considered to be in the province of the state, the federal-state entanglement has intensified as a matter of legal doctrine and practice.” Rick Su, *The Role of States in the National Conversation on Immigration*, in *STRANGE NEIGHBORS: THE ROLE OF STATES IN IMMIGRATION POLICY* 198, 203 (Carissa Byrne Hessick & Gabriel J. Chin, eds., 2014). See also Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *Immigration Federalism: A Reappraisal*, 88 N.Y.U. L. REV. 2074 (2013).

203 Su, *supra* note 202, at 200.

204 See Leticia M. Saucedo, *The Making of the “Wrongfully” Documented Worker*, 93 N.C. L. REV. 1505 (2015) (discussing state-level identity theft statutes used to criminalize working without authorization).

205 See Su, *supra* note 202, at 204–05.

206 See, e.g., E. Tammy Kim, *Lawyers as Resource Allies in Workers’ Struggles for Social Change*, 13 N.Y. CITY L. REV. 213, 213 (2009) (arguing that legal threats are limited in utility, as “[n]o rhetoric of rights or legal prohibition can prevent workers from actually suffering employers’ illegal acts.”).

provisions simply may not work.²⁰⁷ The remedy they provide is a chance to pursue another legal claim, “which may be cold (and late) comfort to a worker who has already lost her job, been deported, or suffered other adverse employment actions.”²⁰⁸ States will need separate measures to solve the back-end problem of judgment-collection that plaintiffs and government agencies meet when attempting to hold employers accountable in court. As a result, they may not be powerful enough to undo the chilling effect that the consequences of retaliation create, especially for undocumented immigrant workers.

State-based reform might also dissuade reform at the federal level, where it is most needed. Regardless of how strong anti-retaliation protections are, they do not create a path to legal status, like the U Visa does. While federal immigration reform has stalled, advocates may make the point that more work needs to be done to strengthen the MOU between DHS and DOL, and create a pathway to citizenship for many of the undocumented workers experiencing wage theft. Only then would immigrant workers truly be protected from immigration-related retaliation.

Finally, prioritizing anti-retaliation provisions will not affect the front-end barriers to effective advocacy, like information gaps about workplace rights and access to legal services. Agencies should continue to devote resources to awareness-raising campaigns, like New York’s Worker Bill of Rights, available in many languages. Above all, states should prioritize engaging with affected communities and individuals to forge trust between immigrant communities and law enforcement, and determine how the law can best meet their needs.

With these concerns in mind, below I examine two states as examples of those that have enacted or should enact anti-retaliation protections specific to undocumented immigrants. California passed an innovative package of anti-retaliation protections that attempts to speak to the risks undocumented workers face when employment and immigration legal regimes intersect. New York is a prime example of a state that should pass similar protections, given its expressed commitment to protecting undocumented immigrants and its many immigrant communities. Looking to the example of California’s statutory protections would be a positive complement to New York’s agency actions. While all states should consider similar provisions, I focus on two examples with the understanding that a one-size-fits-all policy will likely fail, as states and immigrant communities have varying relationships across the country, counseling for individualized approaches to this problem.

207 Alexander & Prasad, *supra* note 24, at 1104.

208 *Id.*

Finally, I consider how a strong anti-retaliation regime renders acts as a tool for undocumented women workers in particular to defy the enforced silence in the exploitative workplace.

1. California's Recent Legislation

California recently passed a series of laws to increase protections for undocumented workers. The laws provide a broad interpretation of employer retaliation by specifying that it includes adverse actions or discrimination against either current or prospective employees for exercising any rights under the California Labor Code, filing or participating in a complaint with the California Division of Labor Standards Enforcement, whistleblowing, or participating in political activity or civil suit against employers.²⁰⁹ The anti-retaliation provision also bars retaliation because a worker made either an oral or written complaint that she is owed unpaid wages.²¹⁰ The law increased penalties for retaliation, up to \$10,000 per employee for each instance of retaliation.²¹¹ It also made clear that workers may bring civil suits without exhausting administrative remedies.²¹² California also broadened protections for whistleblowers.²¹³ While the general prohibitions against retaliation are broad enough to cover the actions of agents of employers and not merely employers themselves,²¹⁴ the whistleblower protections explicitly apply to retaliation by an employer or any person acting on behalf of the employer, catching cases in which an employer attempts to shield himself from liability by using an associate or friend to carry out retaliation.²¹⁵

California's leadership in protecting undocumented workers, however, likely comes from the fact that it amended its laws to speak directly to the type of retaliation these work-

209 CAL. LAB. CODE § 98.6 (West 2015).

210 *Id.*

211 *Id.* at § 98.6(b)(3).

212 *Id.* at § 98.7(g).

213 *Id.* at § 1102.5 prohibits retaliation because an employee provided information "to a government or law enforcement agency, to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance, or for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry," regarding the employer's violation of a local, state, or federal statute or regulation.

214 *Id.* at § 98.6(a) ("A person shall not discharge an employee or in any manner discriminate, retaliate, or take any adverse action against any employee or applicant for employment . . .") (emphasis added).

215 CAL. LAB. CODE § 1102.5 (West 2015).

ers are most likely to experience: that is, retaliation on the basis of immigration status, in the form of reporting or threatening to report an employee to immigration authorities. First, California amended its definition of “adverse action” to include reporting or threatening to report the citizenship or immigration status of the employee or a family member of the employee, because the employee exercised a right under the California Labor Code.²¹⁶ Second, California clarified that threats to report immigration status may constitute criminal extortion.²¹⁷ Third, the legislature added a provision prohibiting employers from engaging in any “unfair immigration-related practice” because an employee exercised a protected right.²¹⁸ No other state has similar language in its labor code. An “unfair immigration-related practice” is defined only by a non-exhaustive list of practices undertaken for a retaliatory purpose, including requesting more or different documents than required by federal law to show work authorization; using the federal E-Verify system to check immigration status in a way that is not required by federal law; threatening to file or filing a false police report; or threatening to contact or contacting immigration authorities.²¹⁹ An employee’s protected rights include filing a complaint, informing another person about workplace rights, or seeking information regarding whether an employer is in compliance with state or local workplace laws.²²⁰

Workers have a private right of action for equitable relief, damages, penalties, and attorneys’ fees if subject to unfair immigration-related practices.²²¹ California’s Division of Labor Standards Enforcement (“DLSE”) and courts are empowered to suspend or revoke a business license for engaging in an unfair immigration-related practice. Thus, DLSE and courts have discretion in determining what constitutes an “unfair immigration-related practice,” but are instructed to consider the harm of suspension or revocation of a business license on other workers, as well as the employer’s good faith efforts to resolve labor vi-

216 *Id.* at § 244(b).

217 CAL. PENAL CODE § 519 (West 2015).

218 CAL. LAB. CODE § 1019 (West 2015).

219 *Id.* at § 1019(b). The list of covered actions explicitly excludes conduct undertaken at the direction or request of the federal government. *Id.* at § 1019(b)(2). This prohibition also does not apply to employers who ask for an I-9 from an employee within the first three days of employment to establish work authorization, such that the law only reaches those employers who decide to “self-audit” in response to a labor dispute. It does not serve to deter employers from hiring only employees with work authorization. CAL. BUS. & PROF. CODE § 494.6 (West 2015).

220 CAL. LAB. CODE § 1019(a).

221 *Id.* at § 1019(d)(1).

olations. The law also provides for a rebuttable presumption that an employer engaged in the retaliatory use of an unfair immigration-related practice if the conduct occurs within ninety days of the worker's exercise of rights.²²² It is still too early to determine how courts will use their discretion in interpreting this provision, as too few lawsuits have yet to make their way through the courts.

2. Recommendations for New York

Currently, New York's statutes have language neither specifying that retaliation protections apply regardless of immigration status, nor targeting retaliation in the form of immigration-related threats. Unlike California, thus far New York has tackled retaliation against undocumented workers who complain of wage theft through top-down agency-led investigations and actions.²²³ Notably, New York does already have robust laws addressing retaliation against workers. Like California, New York's law already protects against retaliation by an agent of the employer, rather than just by the employer himself.²²⁴ New York City also has additional anti-retaliation protections.²²⁵ New York should follow through on its stated commitment by passing measures similar to California's prohibition against "unfair immigration-related practices." While New York could attempt to adopt California's package wholesale, I discuss individual measures below in acknowledgement that such wholesale adoption is unlikely, but also that it will be necessary for workers and advocates to consider how each measure will operate on its own within local contexts, as well as how New York can continue to improve upon California's start.

New York should first clarify via statute that its anti-retaliation protections apply re-

222 *Id.* at § 1019(c).

223 *See, e.g., Governor Cuomo Announces Anti-Retaliation Unit Takes Swift and Aggressive Action to Protect Workers Fired After Wage Theft Investigation*, N.Y. ST. (Dec. 21, 2015), <https://www.governor.ny.gov/news/governor-cuomo-announces-anti-retaliation-unit-takes-swift-and-aggressive-action-protect> [<https://perma.cc/S6Y8-NC7C>]; *Our Services*, N.Y. ST. DEP'T LAB., <http://labor.ny.gov/about/services.shtm> [<https://perma.cc/P6T2-TCE7>] (last visited Jan. 27, 2016) ("Wage Protection[:] The Division of Labor Standards protects all workers, even if they are paid off the books or are not documented.").

224 N.Y. LAB. LAW § 215 (West 2015) ("No employer or his or her agent . . .").

225 Under the New York City Human Rights Law, a plaintiff does not need to establish that the retaliatory act "result[ed] in an ultimate action with respect to employment . . . or in a materially adverse change in the terms and conditions of employment." N.Y.C. ADMIN. CODE § 8-107(7) (West 2015). A plaintiff must show only that the retaliatory act was "reasonably likely to deter a person from engaging in protected activity." *Id.*

ardless of immigration status.²²⁶ While New York has expressed a commitment to apply its anti-retaliation laws in wage theft cases affecting undocumented workers, codifying this promise in statute would provide clearer guidelines to employers *ex ante*. It would also commit future administrations to applying this policy, ensuring that protection against immigration-related retaliation is a fixture of New York labor law, rather than a current trend sparked by the outcry following the *Times*' exposé.

New York should additionally adopt California's explicit prohibition on "unfair immigration-related practices." Currently, under New York law, to retaliate is to "discharge, threaten, penalize, or in any other manner discriminate or retaliate against any employee."²²⁷ This definition is broad and does technically catch retaliation in the form of notifying or threatening to notify immigration authorities of an undocumented worker's lack of status.²²⁸ Nonetheless, in general, calling immigration authorities to notify them of an individual's unlawful presence in the United States is legal and encouraged by the federal government.²²⁹ Specifically naming "unfair immigration-related practices" would make clear to employers that using an employee's lack of immigration status against the employee in the context of the worker's assertion of rights, despite the employee's lack of work authorization, is illegal. It also would pinpoint a harm that undocumented workers uniquely experience, and which perhaps should not fall under the broad umbrella of retaliation that all workers may experience. Adopting the presumption of retaliation that California has adopted would help catch those acts of retaliation which appear legal at first glance (for example, a friend of an employer spontaneously deciding to inform the federal government of a worker's lack of immigration status and unauthorized work), but whose illegality only becomes apparent when considered in temporal proximity to a worker's assertion of a workplace-related right.

New York should expand upon California's policy to take additional measures to root out retaliation that specifically affects undocumented workers and immigrant communities.

226 See, e.g., NELP, WINNING WAGE JUSTICE, *supra* note 20, at 66 (providing model legislation applying all state-level protections to workers regardless of immigration status).

227 N.Y. LAB. LAW § 215(a) (West 2015).

228 See, e.g., *Perez v. Jasper Trading, Inc.*, 2007 WL 4441062, at *3 (E.D.N.Y. Dec. 17, 2007) (allegation that defendants retaliated against plaintiff in wage theft action by threatening to contact immigration authorities stated a claim for retaliation in violation of New York Labor Law).

229 See, e.g., *Reporting Illegal Activity*, U.S. CUSTOMS & BORDER PROTECTION (Jan. 21, 2016), https://help.cbp.gov/app/answers/detail/a_id/735/~/-/reporting-illegal-activity [<https://perma.cc/DJ49-MCEF>] (explaining how to report "illegal aliens" to ICE).

First, New York should consider applying retaliation protections to prospective employees to prevent coercion of employees to accept unfair employment terms through threats of retaliation. Protection of prospective employees could encourage a worker who was offered unfair employment terms, such as beginning work without getting paid for a period of time, being required to pay a training fee to begin work, or being required to work an inherently abusive number of hours, to notify a local workers' center or organizing group of the unfair terms, without fear of retaliation. Applying the protections against retaliation to the initial offer of employment (if the terms are clear upon offer) could also help raise awareness about the types of exploitation occurring.

Second, New York should consider addressing anticipatory retaliation in its laws, to account for the cases in which employers' threats completely chill workers' assertion of rights before such assertion occurs.²³⁰ This would more effectively catch cases in which undocumented women workers, experiencing doubled vulnerability because of both a lack of immigration status and gender, are least likely to speak up in opposition to wage theft.

Third, New York already has retaliation protections specific to certain industries in which retaliation has been known to occur, such as construction.²³¹ To better speak to the harms that female undocumented workers experience, New York should consider passing legislation identifying and prohibiting retaliation in industries in which female undocumented immigrants make up a large percentage of the workforce, such as domestic services, nail salons, and the garment industry.²³²

Fourth, New York should extend retaliation protections to cover an individual's family members, acknowledging that threatening to call the immigration authorities regarding a worker's family member can be as debilitating to a worker who fears separation from her family as threatening to retaliate against the worker herself.²³³ This change would

230 To this end, Charlotte Alexander proposes creating a per se or facial claim for anticipatory retaliation. Alexander, *supra* note 40, at 824–28.

231 See, e.g., N.Y. LAB. LAW § 861-5 (McKinney 2010) (retaliation provision in New York State Construction Industry Fair Play Act).

232 See ANNETTE BERNHARDT, SIOBHÁN MCGRATH & JAMES DEFILLIPIS, UNREGULATED WORK IN THE GLOBAL CITY: EMPLOYMENT AND LABOR LAW VIOLATIONS IN NEW YORK CITY 63, 79, 95 (2007), https://www.brennancenter.org/sites/default/files/legacy/d/download_file_49436.pdf [<https://perma.cc/QZ2N-GBRZ>].

233 See Robin R. Runge, *Failing to Address Sexual and Domestic Violence at Work: The Case of Migrant Farmworker Women*, 20 AM. U. J. GENDER, SOC. POL'Y & L. 871, 889 (2012).

particularly benefit undocumented women, who tend to live with more family members than do undocumented men.²³⁴

Finally, these legislative improvements will likely be ineffective if not coupled with practical improvements in how state and local governments learn about and address exploitation of immigrant workers. Any governmental interest in improving the law with respect to wage theft and retaliation should begin with extensive discussions between governmental agencies and the immigrant communities that wage theft most affects.²³⁵ On a practical level, this will likely entail increasing funding for hiring interpreters for the many language groups represented in New York's immigrant worker population, as well as sending investigators and interpreters to areas where immigrant workers are concentrated. This should also entail partnering with community groups that have been advocating for immigrant workers for years and who are most familiar with effective advocacy methods in particular communities.²³⁶ Above all, the state should listen to narratives directly from affected workers themselves, and should only favor policy solutions that address concerns from workers' own perspectives.

D. Anti-Retaliation as a Tool for Undocumented Women Workers to Defy Silence

A strong anti-retaliation regime that includes the policy prescriptions outlined above would set up a shield between the story a worker chooses to tell and the consequences for her immigration status. Such policy changes would create space for women to retell their narratives of wage theft in diverse ways and allow them to include the cultural, economic, and gendered forces that structure the exploitative workplace in their stories. Protection from retaliation defies an employer's enforcement of silence that punishes workers who

234 See, e.g., Blanca Gullen-Woods, *Gender and Undocumented Immigrant Experiences*, LATINO DECISIONS (May 10, 2013), <http://www.latinodecisions.com/blog/2013/05/10/gender-and-undocumented-immigrant-experiences/> [<https://perma.cc/9SK3-S5ZZ>].

235 For an example of effective community organizing related to this issue, see Jennifer Jihye Chun, George Lipsitz & Young Shin, *Immigrant Women Workers at the Center of Social Change: Asian Immigrant Women Advocates*, in IMMIGRANT WOMEN WORKERS IN THE NEOLIBERAL AGE (Nilda Flores-Gonzales et al., eds., 2013).

236 See, e.g., Healthy Salons for All, a guide for nail salon workers and customers created by Adhikaar, an advocacy organization for the Nepali-speaking community in New York, in partnership with the non-profit Center for Urban Pedagogy, illustrating worker rights and providing guidance in English, Spanish, Korean, Chinese, and Nepali. *Healthy Nail Salons Campaign: From the Grassroots Up*, ADHIKAAR, <http://www.adhikaar.org/nail-salon-campaign/> [<https://perma.cc/DP2E-EQD7>] (last visited Feb. 21, 2016).

challenge exploitative practices and renders the experiences of these workers invisible.²³⁷ The experiences of undocumented women workers, who are largely Latina or Asian, occupy the particularly vulnerable space at the intersection of sexism, low-wage work, and undocumented status.²³⁸ By defying silence, a focus on anti-retaliation is a strategy that aims for the additional benefit of empowering undocumented women workers by prioritizing their ability to tell personal stories and challenge the systems of subordination that allow employers to perpetuate wage theft.²³⁹

The stereotypes about particular groups of low income, immigrant women of color implicit in legal remedies have long required women and their lawyers to tell constricted narratives in order to be successful. As Stewart Chang argues, the Trafficking Victims Protection Act (“TVPA”), which provides T Visas to survivors of sex trafficking, perpetuates stereotypes of Asian immigrant women, requiring women to argue that they were victims of sex trafficking—but not willing accomplices.²⁴⁰ The visa adjudication process simultaneously focuses on the “rescue and assimilation” of the Asian immigrant woman into a vision of an egalitarian American society, and perpetuates a damaging cliché of “the evils of Asian patriarchy that are repudiated, overcome, and left behind.”²⁴¹ Similarly, immigration remedies for survivors of domestic violence, like the U Visa or remedies under VAWA, require applicants and their lawyers to present the “stock narrative of a brave victim of domestic violence: a woman who suffered physical, psychological, and economic abuse, who needed to provide for the two children she loved, and who took the necessary steps to do so.”²⁴² As feminist scholars argue, the law often requires simplistic victim-perpetrator

237 See Brake, *supra* note 136, at 64.

238 See Leticia M. Saucedo, *Intersectionality, Multidimensionality, Latino Immigrant Workers, and Title VII*, 67 SMU L. REV. 257, 262–64 (2014).

239 For a discussion of “narrative space,” see generally Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1268–86 (1993). See generally Brake, *supra* note 136, at 65–67.

240 Chang, *supra* note 193, at 254.

241 *Id.* at 260.

242 Keyes, *supra* note 189 at 240. See also Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE L.J. & FEMINISM 75, 118 (2008) (“When we edit the stories of battered women, we lie about who they are and how they perceive the world around them. When those stories are accepted by others as truth, women are forced to live that lie.”).

narratives from marginalized groups like women and low-income people of color in order for these individuals to “win.”²⁴³

In the context of workplace rights, advocates should pursue policies that allow women to voice the reality of the cultural and gendered narratives that impact their experience of exploitation and subsequently vindicate their employment rights. For example, Llezlie Green Coleman identifies three cultural narratives that she argues impact the experiences of Latina workers: the “deference narrative” of valuing deference to male authority figures in families and communities; the “exalting self-abnegation narrative” emphasizing the “pure and passive Latina, who subordinates her interests to those of others;” and the “*familisimo* narrative” of the Latina as the protector of the family.²⁴⁴ Narratives like these are excluded from the discourse surrounding wage theft absent policies protecting immigrant women’s storytelling.

Additionally, often hidden from the narratives presented to adjudicators and the public is the particular way in which wage theft harms the many female undocumented workers that are mothers. Because of their long hours, “[m]any manicurists pay caregivers as much as half their wages to take their babies six days a week, 24 hours a day, after finding themselves unable to care for them at night and still wake up to paint nails.”²⁴⁵ The difficulty of securing child care that impacts so many low-wage working parents is exacerbated for those who are undocumented, as some parents believe, often incorrectly, that their immigration status makes them ineligible for child care assistance.²⁴⁶ Moreover, the fear of immigration-based retaliation dissuades undocumented workers from challenging employers’ scheduling practices.²⁴⁷ In many industries reliant on immigrant women workers, low wages and unpredictable schedules, coupled with the high cost of child care, cause some workers to send their young children back to their home countries to live with other family

243 See, e.g., Carolyn Grose, *Of Victims, Villains and Fairy Godmothers: Regnant Tales of Predatory Lending*, 2 NE. U. L.J. 97 (2010) (arguing for a multiplicity of narratives in the predatory lending context, in which lawyers are often forced to fall back on default narratives about clients who are victims who made bad choices in the midst of high-stakes crises).

244 Coleman, *Exploited at the Intersection*, *supra* note 26, at 408–14.

245 Nir, *supra* note 1. See also NAT’L WOMEN’S LAW CTR., LISTENING TO WORKERS: CHILD CARE CHALLENGES IN LOW-WAGE JOBS (2014), http://www.nwlc.org/sites/default/files/pdfs/listening_to_workers_child_care_challenges_in_low-wage_jobs_6.24.14.pdf [<https://perma.cc/P6JV-AKQL>] (describing the challenges low-wage workers face in securing child care).

246 NAT’L WOMEN’S LAW CTR., *supra* note 245, at 7.

247 *Id.*

members, separating families for years.²⁴⁸ These narratives provide much-needed context to the stereotypes that are implicit in available legal remedies, as they explain why immigrant women workers may not choose to speak up—let alone quit their jobs, bring a publicized lawsuit, or initiate a labor organizing campaign regarding workplace violations.²⁴⁹ These nuanced narratives also add the intangible dimension of the harm that comes from a parent's separation from her family, which is likely excluded from calculations of lost wages presented to courts and agencies.

Creating narrative space will also inevitably produce stories that complicate or defy existing narratives, as women shine a light on the reality of their workplace dynamics. In the nail salon industry, for example, the expected narrative of the subordinated female worker under the exploitative male owner is complicated by the fact that Korean immigrant women make up a large portion of nail salon owners in New York.²⁵⁰ As employees in nail salons are frequently able to move up from apprentices to highly skilled manicurists and then owners, the industry has provided economic mobility for many Asian immigrant women, and it is one of the most important sources of their employment.²⁵¹ Thus, giving voice to the complicated narratives of female immigrant workers in the nail salon industry will allow women and their legal advocates to choose strategies that meet the particular needs of their own communities: the fact that businesses in this particular industry are largely owned by a member of an employee's own ethnic community, for example, may lead advocates to eschew remedies that are likely to result in shutting down or overly regulating these same businesses.

Without a strong anti-retaliation policy, women and their advocates must edit their stories to fit accepted scripts of exploitation. By contrast, when policies adequately guard immigrant women workers from retaliation, these women are free to tell narratives that resist

248 *Id.* at 6–7.

249 *See* Coleman, *Exploited at the Intersection*, *supra* note 26, at 415 (“The narratives and resulting expectations run counter to the presumptions imbedded in our legal system that assume workplaces are largely regulated by workers themselves who will enforce our workplace laws through private enforcement or labor-organizing measures. Put simply, there is tension between the narratives described herein and the expectation of private enforcement of workplace laws.”).

250 EUNJU LEE, *GENDERED PROCESSES: KOREAN IMMIGRANT SMALL BUSINESS OWNERSHIP* 134 (2006). This phenomenon raises the question of how and why these immigrant women business owners negotiate the demands of capitalism to ultimately rest their own survival and success on the cheap labor—and therefore perpetuate the exploitation—of other immigrant women. This question is largely outside the scope of this paper, however.

251 *Id.* at 140. *See also id.* at 143; NAT'L ASIAN PACIFIC AM. WOMEN'S FORUM, *supra* note 10, at 2.

stereotypes and choose advocacy methods that best meet their goals. With strong protections in place, workers would have increased freedom to prioritize organizing with fellow workers in their industry in order to achieve systemic change, without requiring anonymity, rather than pursuing private and individualized forms of relief, like the U Visa or individual complaints, through enforcement agencies. If they choose to, they can expose labor practices, with the safety that Nir had while writing her exposé. Moreover, anti-retaliation protections that specifically address retaliatory use of immigration-related threats create space for a worker to tell her complete story, including the fact that she is undocumented, as part of whatever legal remedy she pursues or organizing movement she participates in.

CONCLUSION

The story of wage theft in New York City nail salons is just one example of exploitation that occurs in many industries that rely on immigrant labor. Wage theft in these industries is made possible in part because of weak legal protections for those workers who choose to come forward to make a claim or tell their story, allowing employers to engage in retaliation, often with impunity. Although federal anti-retaliation protections for immigrant workers are unlikely to advance in today's political climate, states that have expressed a commitment to protecting immigrant workers have an opportunity to use their labor laws to acknowledge the specific dangers facing undocumented workers who attempt to enforce their workplace rights.

As this Article has argued, focusing on anti-retaliation in policymaking provides pragmatic and conceptual benefits. First, a meaningful guard against retaliation would make legal frameworks designed to combat wage theft—including criminal, civil, agency-led, and market-based ones—more effective. Anti-retaliation rules specific to immigration status make it clear that the rights that come with employment, and are enforceable through each of these frameworks, are not at all linked to citizenship.²⁵² Second, prioritizing anti-retaliation resists the victim-centered narratives that legal remedies have historically required from female undocumented immigrants in particular. By allowing a worker to defy the code of silence that her employer attempts to enforce through retaliation, strong anti-retaliation policy creates the conditions in which an immigrant woman worker may safely pursue advocacy rather than prove victimization.

252 See generally, Mondragón, *supra* note 96 (advocating for the greater use of retaliation claims under both federal and state laws, plus the development of a retaliation per se rule in workplace injury cases that would make employer inquiries into a worker's immigration status at any point after injury a per se violation).